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General No. 7325

Agenda No. 40

April Term 1921

Milo Wheeler, Appellee

vs.

Cyrus O. Loveless, Appellant

Appeal from County Court Macoupin County.

226 I.A. 625

HEARD, J.

This is a suit for a broker's commission on a sale or exchange of real estate. It originated before a Justice of the Peace and was brought on appeal to the County Court. The appellee recovered a verdict and a judgment for \$96.20, and costs; and the appellant in the suit brings this appeal to reverse the judgment of the County court.

The facts stated briefly are as follows: The appellee, Wheeler had authority from W. E. Schmidt, a banker at Gillespie, Illinois, to sell 240 acres of timber land at a purchase price of \$17,000.00. He also had authority to sell 160 acres of prairie farm, which belonged to W. G. Bartels, a retired mine owner living at Carlinville. The appellant, Loveless wanted to buy this Rinaker farm, but he desired to dispose of and pay part of the purchase money for it with a 74 acre tract of land which belonged to his wife.

Appellee went to the home of Mr. Bartels in Carlinville one morning and contracted for the purchase of Bartel's 160 acres known as the Rinaker farm for a purchase price of \$30,000, and he agreed to pay this sum, by deeding to Bartels, W. E. Schmidt's 240 acres of timber land at an agreed price of \$17,000 and to pay \$13,000 in cash. He gave his own personal check for \$1,000 to bind this bargain with Bartels. He went to Gillespie that same morning with the appellant to Schmidt's bank and made known to Schmidt that he had bought the Bartels farm for him, and then on the same day about noon, appellee, acting as Schmidt's broker, as he says, sold the Rinaker farm to the appellant, Loveless, at and for a purchase price of \$32,000, a part of which purchase price was the Loveless 74 acre tract at a valuation of \$65.00 per acre. So Schmidt sold his 240 acres to Bartels for \$17,000; Bartels

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sold the 160 acre Rinaker farm to Loveless, the appellant, for \$32,000 and Loveless sold the 74 acre tract to Schmidt for \$4,810. It is contended by appellant that as appellee received commissions from Bartels and Schmidt that he is, for that reason, precluded from collecting a commission from appellant.

In Bunn vs. Keach, 214 Ill. 259, it was said: "The general rule is that an agent cannot act for two parties whose interests are adverse. The rule that a man cannot serve two masters is as well established in law as in morals, and an agent that is employed to sell cannot be agent for the purchaser unless the principal sought to be held liable has consented."

Bartels and Schmidt each testify that they knew that appellee was to receive commissions from the various parties. Appellee testified that he told appellant that Bartels was paying him a commission and that appellant replied that he did not care how many were paying and that if he deeded the farm he would pay appellee two per cent. This conversation was denied by appellant who testified that he did not know that appellee was to receive a commission from the other parties and that he only agreed to pay a commission in case the 74 acres were sold for \$75 an acre.

The questions involved in this case are purely questions of fact which it was the province of the jury to determine. The jury having determined these questions of fact and the trial judge who saw and heard the witnesses having approved the verdict under the evidence in this case we would not be warranted in reversing their finding.

The judgment is affirmed.

General No. 7329

Agenda No. 43

April Term 1921

William Hartlipp, Appellee

vs.

George Wiemer, Appellant

Appeal from Logan.

HEARD, J.

226 I.A. 825

This is a suit brought by appellee against appellant for damages arising out of an alleged breach of warranty in the sale of an Avery tractor by appellant to appellee. A jury trial resulted in a judgment in favor of appellee against appellant for \$450 damages and costs, from which judgment an appeal has been taken to this court.

The warranty alleged in the declaration for the breach of which appellee claimed damages was: "That the said tractor was then and there well constructed of good workmanship and material and was free from defects of workmanship or material and was well constructed and that the said tractor would do good and satisfactory work and would operate and could be operated in a satisfactory manner and that if said tractor did not do good and satisfactory work he the said defendant, would make the said tractor do good and satisfactory work as a tractor."

Appellee testified that when negotiating for the purchase of the tractor in question appellant told him that the tractor was guaranteed to do good work and that if it did not he would make it work good.

At the request of appellee the court gave to the jury the following instruction: "The Court instructs the jury that if you believe from a preponderance of the evidence in this case that the defendant George B. Wiemer warranted to the plaintiff William H. Hartlipp the tractor described in evidence, as alleged in the declaration or any count thereof and that the said tractor at the time of said sale and warranty did not comply with the terms of said warranty, then you should find the issues for the plaintiff, Hartlipp."

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If the warranty was made as testified to by appellee it was not warranty as to the condition of the tract-

or at the time of the sale, but was a warranty that if the machine was not at that time in condition to do good work it was capable of being put in such condition and that appellant would put it in condition and make it do good work.

The evidence clearly shows that at the time of the sale or very shortly thereafter the tractor was in good working order, but there is a sharp conflict in the evidence as to whether or not when complaint of such condition was made to appellant, he did not put it in good working condition. In this state of the pleadings and evidence it was clearly erroneous to instruct the jury to find for the plaintiff "if the warranty was made and that the said tractor at the time of said sale did not comply with the terms of said warranty."

The judgment of the circuit court is reversed and the cause remanded.

General No. 7342

Agenda No. 55

April Term 1921

Adolph Oberle, Appellee

vs.

Louis Lessman, Appellant

Appeal from Montgomery.

HEARD, J.

226 I.A. 625

This is an appeal from a judgment of the circuit court of Montgomery county against appellant for the sum of \$291.68 and costs in favor of appellee.

The suit was originally brought before a Justice of the Peace where no written pleadings were required and in the circuit court on appeal appellant had the right without formal pleadings to urge any defense which he might have. Lathan vs. Summers, 89 Ill. 233.

The evidence shows that in the early part of 1919 appellant and appellee entered into a partnership agreement to purchase and sell seed corn, appellant testifying that it was the agreement to purchase two car loads of corn, one to be shipped to him at Raymond, Ill., and the other to be consigned to H. J. Bender, brother-in-law of appellee, at Nokomis, Ill., and appellee testifying that the agreement was to purchase only one car of corn which was to be shipped to appellant at Raymond.

The evidence shows that the parties went to Jackson county where two cars loads of corn were purchased, one which was shipped to Raymond, when both parties were present, and one, the next day, by appellee, when appellant was not present. The latter car load was shipped to Nokomis and retailed under appellee's directions, he receiving the proceeds of the sale. The checks received from the sale of the Raymond car of corn were all made payable to appellant.

Some time after the Raymond car of corn had been sold, the parties met at the office in Raymond and figured up the net profits on the Raymond corn and found them to be \$596. Appellee demanded payment of one half of this amount, and, according to the testimony of appellee, appellant refused payment saying that he had a half interest in the other car of corn and he was going to hold this money until the other car was sold and reported. The theory of the case as tried by counsel for

appellee was that it was a partnership matter involving only one car of corn; that is, the Raymond car, and that there

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had been a settlement or adjustment of the accounts as to that car of corn and that a suit to recover Oberle's half of the net profits would lie and also that Lessman had nothing whatever to do with the car of corn that was to be shipped to Nokomis. One of appellant's contentions was that it was a partnership matter extending to both cars of corn and that an adjustment of it could not be had in a court of law, but that it should be tried in a court of chancery.

In *Burns. v. Nottingham*, 60 Ill., 531, the court said: "It is the settled law of this Court that one partner cannot bring an action in assumpsit against his late partner unless upon a dissolution of the co-partnership, the partners account together and a balance is stated in favor of one and the other agrees to make payment of such sum. The balance so found must be a final settlement of all the partnership accounts, but balances only struck preparatory to a final account are not sufficient to form the subject matter of an action at law; until this is done the remedy is in equity."

In 20 M. R. C. L. pg. 924-6, it is said; "It is a general rule that so long as a partnership continues one partner cannot maintain an action at law against the firm or against his co-partner on account of the matter connected with the partnership. This disability continues until there is a settlement of the accounts and a balance struck and persists, until these events transpire although there has been a dissolution of the partnership. ***** Nor will assumpsit lie in favor of one partner against the other on an implied promise except for a liquidated balance either struck by the parties or a result of a final adjustment of the partnership concern."

In the succeeding section of 20 R. C. L. page 925-6 it is said: "The converse of the general rule limiting the right of one partner to sue his associates during the continuance of the firm relation in reference to partnership matters, also holds true, and it is generally recognized that after a balance has been struck, based on accounting between the parties, one partner may sue his co-

partner in assumpsit for such balance."

Upon the trial the court at the request of appellee gave to the jury the following instruction: "The court

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instructs the jury that if you believe from a preponderance of the evidence in this case that the plaintiff Oberle and the defendant Lessman stated an account between themselves concerning the purchase and sale of a car of corn, and a balance was shown to be due to plaintiff from the defendant as his proportionate share of the net profits of the sale of said corn, and that the plaintiff has not been apid by the defendant, then you should find the issues for the plaintiff and fix his damages at such sum as you may find from the evidence is due to the plaintiff under said statement of account." This instruction directed a verdict and was erroneous in entirety ignoring the material question of fact as to whether or not the partnership agreement covered the two loads of corn.

The judgment is reversed and the cause remanded.

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General No, 7345

Agenda No. 10

Floyd J. Hutson, and William H. Nicholson,
Defendants in Error

vs.

John Barton Payne, Agent, operating the Cleveland, Chicago and St. Louis Railroad, Plaintiff in Error
Error to Coles County Circuit Court.

HEARD, J.

226 I.A. 625

This is an action brought on the case brought against John Barton Payne, agent, operating the Cleveland, Cincinnati, Chicago and St. Louis Railway Company by appellant, Floyd J. Hutson and W. H. Nicholson, appellees. A judgment for eight hundred dollars was rendered by the Circuit Court of Coles County against Appellants and he prosecutes this appeal.

The appellees claim is for damages to a truck claimed to have been sustained in a collision with a passenger engine of the C. C. C. & St. Louis R. R. Co.

At the time of the collision the truck was being driven by Floyd J. Hutson and the collision is the one which furnished the basis for the claim in Hutson vs. Payne, decided at the October term and reported in Ill. App. Reference to the opinion in which case is made for a full statement of the location, facts, circumstances and surroundings of the collision.

The evidence in this case is practically the same as it was in that case and we held in that case that the jury were justified in finding that the driver of the truck was not guilty of contributory negligence and that the accident was proximately caused by negligence of appellant's servants.

Complaint is made of the giving and refusal of instructions while two of plaintiff's instructions are somewhat defective, we are

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of opinion that when all of the instructions are considered together the jury could not have been misled thereby. The instruction refused was properly refused.

The judgment of the Circuit Court is affirmed.

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April Term 1921

Hoveland, Sardeson, McColem Company, Appellant

vs.

Emma Sell, Appellee
Appeal from Christian.

226 I.A. 625

HEARD, J.

Appellant was engaged in the business of manufacturing ladies' and children's coats in Chicago. Appellee was in the retail business at Pana, Illinois.

In June, 1918, a salesman for appellant called upon appellee and secured her order for several hundred dollars worth of goods to be shipped to appellee during the month of July, 1918.

A portion of the goods were made up and shipped to appellee about July 18, 1918. Appellee immediately returned some of the goods received, claiming that they were not according to sample and wrote appellant asking to have her order cancelled, and stating that she would be in to see appellant about Aug. 1st and that she wanted to see what she was buying.

Appellant immediately replied that it would credit her with the garments that she returned, but that the balance of her order was in work, and that they could not accept cancellation for them, and would ship them.

Appellant held the goods until August 3rd, at which time it received a letter from appellee dated August 1st, stating that she had cancelled her order, and that she could not receive any more merchandise.

Some time in the early part of August 1918, appellant shipped the remainder of the order of goods to appellee at Pana by American express. Appellee refused the goods when tendered by the express company and after being held by the express company at Pana for a considerable time they were sent by the express company to its salesrooms to be sold for the express charges.

Appellant then brought suit against appellee in assumpsit upon the order for the purchase price of the goods. A trial resulted in a

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judgment in favor of appellee for costs, from which judgment this appeal has

been taken.

It is claimed by appellant that the verdict was against the weight of the evidence. It is not disputed that the goods were to have been shipped in July, 1918, and that they were not shipped at the time specified in the order.

When a contract specifies the time when delivery is to be made, time is of the essence of the contract, and if delivery is not made within the time specified the buyer is not liable upon the contract and he may refuse to accept the goods. 35 Cyc. 175.

It is claimed by appellant that by reason of the letter of appellee asking to have the order cancelled and stating that she would be in to see appellant about Aug. 1, appellee cannot urge as a defense to this proceeding that the goods were not shipped during July. With this contention we can not agree. Appellee did not ask for a delay in shipment, but for a cancellation of the order and the letter should have operated as a warning to appellant to strictly comply with the terms of the contract if it desired to enforce it.

A complaint is made of the refusal of an instruction requested by appellant. This instruction was not consistent with the views herein expressed, and was properly refused. Some complaint is made of the giving of instructions on behalf of appellee. We find no error in that regard.

The judgment is affirmed.

General No. 7350

Agenda No. 61

April Term 1921

Harlan Ripple, by Wesley Ripple, his next friend,

Appellee

vs.

Wabash Railroad Company, a Corporation, Appellant

Appeal from Vermilion

226 I.A. 626

HEARD, J.

Harlan Ripple, by Wesley Ripple, his next friend, brought suit against the Wabash Railroad Company and the Danville, Urbana and Champaign Railway company. At the close of the plaintiff's evidence the suit was dismissed as to the Danville, Urbana and Champaign Railway Company and the declaration amended so as to proceed against the Wabash Railroad Company alone.

The first count of the declaration charges that the Wabash railroad company within the limits of the village of Tilton had a switch track immediately adjoining a public alley; that the ordinance of the village of Tilton prohibited the obstruction of any street or alley, and that prior to June 8, 1920, the defendant negligently placed a pile of ties partly across the alley and partly upon the right of way of the railroad and within two or three feet of the east rail of the track, and constituted a nuisance which attracted, or was liable to attract, children of tender years, and that the plaintiff was attracted to said pile of ties, and while playing on the same, a number of cars upon the switch track were bumped together, which frightened him so that he slipped and fell upon the track so that he was run over and his left leg cut off.

The second count is substantially the same, except that it charges that the railroad company, knowing the location of the pile of railroad ties, permitted the same to remain and thereafter operated cars over the tracks.

The trial resulted in a judgment for \$4,000 in favor of appellee against appellant, from which judgment this appeal has been taken.

The evidence introduced proved, or tended to prove, the following facts: that the right-of-way of the Wabash Railroad company along

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this switch was twenty feet wide;

that running north and south immediately adjoining the right of way upon the east was a public alley, fifteen feet in width, platted and laid out; that there was no fence between the alley and the right of way and that the ordinance of the village forbids the placing of obstructions in or upon the alley, in whole or in part. The Wabash switch is crossed at a point about six hundred feet north of the place of the accident by a public highway known as the Catlin road. The switch from a point about two hundred feet south of the Catlin road and extending north was equipped with a trolley, so that electric engines of the Danville, Urbana and Champaign railway could switch cars on this track.

In the month of May, 1920, the Wabash hauled ties, eight feet long, six inches thick and eight or ten inches wide on cars and distributed them along this right of way to repair the track. They threw the ties off, one at a time, from the cars, ten to fifteen ties every thirty feet. No attempt was made to pile the ties, but they were slipped off endwise. These ties remained along the right of way from May until some time in the month of July, at which time the section men of the Wabash put them in the track, taking out all old bad ties and putting in new ones. Not all of the old ties were taken out, but about ten to every rail. The grade of the track was ten to fourteen inches higher than the grade of the alley.

Harlan Ripple lived with his father and step-mother in a house on L street in Tilton. L street is parallel with said public alley and runs north and south. The Ripple house faced east on L street and at the back of the lot upon which the Ripple house was located, ran this public alley. On June 8th, 1920, Harlan Ripple was injured on the track at a point directly back of the lot upon which he

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lived, about 75 to 100 feet from his house. At that time certain cars were standing on the switch, and the Danville, Urbana and Champaign electric motor backed into these cars, struck them and bumped them. A little later he was discovered crawling over the ties spread along the track, with his leg badly crushed. His mother then found him and carried him into the house,

and his leg was amputated.

Appellee introduced evidence tending to show that at the place of the accident there was a pile of ties from two to three feet high extending from the alley to within two feet of the track and that the top one of the ties extended from two to three and one half feet into the alley where the end rested upon the ground and this pile is what is claimed to have been the attractive nuisance.

There was evidence tending to show that for three weeks prior to the accident small children frequently played upon this pile of ties but there is no evidence showing that any of the railroad employees knew of such fact.

There was no occurrence witness except the injured boy and he testified that he was standing on the ties and the cars came up and bumped and scared him; that he fell down and cut one foot off and that is all he knows about it.

When the evidence is considered in its aspect most favorable to appellee the case is one of doubtful liability and it was therefore of the utmost importance that the jury should be accurately instructed.

On behalf of appellee the court gave the following instruction: "The court instructs the jury that if you believe from the greater weight of the testimony that the defendant, Wabash Railroad Company, on and prior to the 8th day of June, 1920, was in possession of a certain switch track running through the west part of the Village of Tilton, and that the right of way of said switch track abutted up and against a certain public alley in the Village of Tilton, and that on and prior to said date the said defendant had placed or maintained

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near to said track and in whole or in part upon said public alley, a certain pile of railroad ties; and if you further believe from the evidence that said pile of railroad ties was so placed in violation of an ordinance of the Village of Tilton, Illinois, and was so situated and constructed so as to attract, or become liable to attract, to be and play about the same, children of tender years and if you further believe from the testimony that the said defendant, knowing such facts, operated or permitted

to be operated, cars over and along said track while said obstruction there remained; and if you further believe from the testimony that the plaintiff was a child of tender years and was attracted to said pile of ties by the allurements thereof, and, while playing upon the same, was frightened or startled by the movement of cars upon said track so that he fell from said pile of ties upon the rails of said track and was run over and injured; and if you further believe from the testimony that the plaintiff was in the exercise of due care and caution for his own safety at the time when he was injured; that then and in such state of the proof, if such state of the proof exists herein, the plaintiff has made out his case so as to require said defendant to show that the said plaintiff suffered such injuries without any fault on its part.

The giving of this instruction is assigned as error. By the giving of this instruction the jury were in effect told that there was evidence in the record from which they might find that the pile of ties were placed where they were in violation of an ordinance of the Village of Tilton. The ordinance in question is as follows: "No person or persons or corporations, shall erect, construct or place, or cause to be constructed or placed, any building, fence or other obstruction, in whole or in part, upon any street, alley, sidewalk or other public ground within the village, under a penalty of not less than one dollar not more than two hundred dollars." There was no evidence that the pile of ties, if there was such pile, was placed where it was in violation of the ordinance. There is a very serious conflict in the evidence

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as to whether there was in fact a pile of ties at the place in question, but if there was such pile, it was on the railroad company's right of way and there was a tie with one end on the ground from two to three and a half feet out in the alley and the other end resting on the pile of ties. Even if this constituted a violation of the ordinance there was no evidence whatever that such violation had anything whatever to do with bringing about the accident. It was in no way shown by the evidence to have been a proximate cause of the accident. It is not every violation of an ordinance which will render the violator liable

for injury. It is only where the person injured is in the exercise of ordinary care for his own safety and the violation of the ordinance is the proximate cause of the injury. The reference to the ordinance in the instruction in question had a tendency to mislead the jury.

This instruction is erroneous in other respects. In order to charge a person engaged in the business of handling a dangerous agency with liability it is necessary that the injury which results from such dangerous agency be one which a person of ordinary prudence, in the light of the surrounding circumstances would reasonably and naturally have anticipated. *Austin v. Public Service Company*, 299 Ill. 112. It certainly cannot be held as a matter of law that the servants of the railroad company should have anticipated that a boy standing on the ties would be scared so that he would fall in such a way that his foot would be crushed under the wheel of a passing car.

While this instruction does not direct a verdict it purports to tell what is necessary to make out plaintiff's case. Negligence to be the basis of liability must be the proximate cause of the accident. This and other of appellee's given instruction entirely ignored this rule. The instruction is also erroneous in telling the jury if a certain state of proof exists that the plaintiff has made out his case so as to require said defendant to show that the said plaintiff suffered said injuries with-

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out any fault on his part. In this case even if the evidence showed the facts stated in the instruction the burden of proving defendant guilty rested upon the plaintiff and defendant was not required to prove itself not guilty.

An instruction which tells the jury what is necessary to prove plaintiff's case must include all the facts necessary to make out such case. This instruction after in effect telling the jury that if they find the plaintiff was attracted by an attractive nuisance and while playing upon the same "was frightened or startled by the movement of the cars upon said track so that he fell from said pile of ties upon the rails of said track and was run over and injured, etc." There was nothing inherently dangerous in this pile of ties which could cause the boy

to fall underneath the wheel of the car. There are no facts stated in the instruction or in the evidence as to the manner of his fall, the connection of the pile of ties therewith, or how he got from the ties up the grade and beneath the wheels in any way that the court could say as a matter of law that the plaintiff had made out his case.

The giving of these instructions was reversible error. The judgment is reversed and the cause remanded.

General No. 7358

Agenda No. 9

October Term 1921

DeWitt W. Smith, Defendant in Error

vs.

Allemania Fire Insurance Company, et al.,

Plaintiffs in Error

Error to Circuit Court of Sangamon County.

Hon. Norman L. Jones, Trial Judge

HEARD, J.

226 I.A. 826

Defendant in Error, DeWitt C. Smith, filed a bill in chancery in the Circuit Court of Sangamon County, to recover upon twenty-two fire insurance policies, aggregating \$86,000, issued to him by the seventeen defendants. The Court entered a decree awarding him \$78,409.26, and apportioning that amount among the several defendants. An appeal was prosecuted to this court by each of the seventeen defendants severally, which appeals resulted in a reversal of the decree, the cause being remanded to the Circuit Court with directions to proceed in accordance with the views expressed in the opinion which is reported in Smith vs. A. F. Ins. Co., 219 Ill. App. 506, to which opinion reference is made for a statement of the facts.

A rehearing in the Circuit Court resulted in a decree in favor of Defendant in Error against the seventeen defendants for the sum of \$74,971.87, which amount is by the decree apportioned among the several defendants. Plaintiffs in Error have sued out writs of Errors for the purpose of having the decree reviewed by this Court.

The first contention of Plaintiffs in Error is that a court of equity is without jurisdiction in this case. This identical question was raised in Smith vs. A. F. Ins. Co. supra, and, while the personnel of the Court has changed since the decision in that case, the opinion in that case is binding upon us now, and we must therefore hold in accordance with the opinion then expressed that the Chancellor did not err in assuming jurisdic-

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tion of this cause.

It is next contended that the Chancellor did not

adoption the correct measure of damages. This court on the former hearing held that the term "actual cash value" contained in each of the policies meant "reproduction value less depreciation for age, and not market value," and that holding is now binding upon us.

Much evidence was introduced bearing upon the question of the loss sustained by defendant in error by reason of the partial destruction by fire of the building covered by the policies in question. Without detailing this evidence in this opinion, suffice it to say that the chancellor evidently attempted to proceed in accordance with the views expressed in our former opinion, and his finding as to the amount falls within the range of the evidence.

The decree of the circuit court is therefore affirmed.

General No. 7359

Agenda No. 10

October Term 1921

George Steely, Appellee

vs.

Charles Gritton, Appellant

Appeal from the County Court of Vermilion County.

HEARD, J.

This is an appeal from the judgment of the County Court of Vermilion County in favor of appellee against appellant for \$110.00 and costs.

Appellee's claim is for professional services rendered by him as a physician and surgeon to Appellant's son who was 29 years of age. Appellee performed an operation for appendicitis upon the appellant's son. Appellee testified that after the first operation appellant told appellee that he would pay appellee for further services rendered to the son, and that the services for which claim is made were rendered after such promise and in pursuance thereof. Appellant denies the making of such promise. This raised a question of fact for the jury and they evidently found in favor of appellee.

Appellant contends that even if such promise was made, it was a special promise to answer for the debt of another, and therefore, void by reason of the Statute of Frauds. If appellee's testimony is to be believed, then the promise was not a promise to answer for the debt of another but was an original undertaking on the part of the appellant to pay for future services, whether or not this promise was made was purely a question of fact for the jury, and we would not be justified in disturbing their finding.

Complaint is made of the admission in evidence of statements of appellant's son to appellee made out of the presence of appellant while the son was being examined by appellee prior to the first operation. While some of these statements

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were probably incompetent, the vital question in the case was whether or not the promise was made as claimed and these statements could have had no bearing upon that question, and their admission was not prejudicial error.

Some complaint is made as to the giving and refusal of instructions. We are of the opinion that the court did not err in that respect.

The judgment is affirmed.

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General No. 7373

Agenda No. 22

October Term 1921

The People of the State of Illinois, For the use of
Joseph C. Overby, Appellant

vs.

S. S. Kresge Company, a Corporation, Appellee
Appeal from the Circuit Court of Sangamon County

HEARD, J.

This is an appeal from a judgment of the circuit court of Sangamon County in an action, heard upon appeal, brought in the name of the People of the State of Illinois, for the use of Joseph Overby a colored person, under what is known at the Civil Rights Statute of the state which provides:

"That all persons within the jurisdiction of said State of Illinois shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, eating houses, hotels, soda fountains, saloons, barber shops, bath rooms, theaters, skating rinks, concerts, cafes, bicycles (bicycle) rinks, elevators, ice cream parlors or rooms, railroads, omnibuses, stages, street cars, boats funeral hearses and public conveyances on land and water, and all other places of public accommodation and amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens.

2. That any person who shall violate any of the provisions of the foregoing section by denying to any citizen, except for reasons applicable alike to all citizens of every race and color, and regardless of color or race, the full enjoyment of any of

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the accommodations, advantages, facilities or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offense forfeit and pay a sum of not less than twenty-five (25) dollars nor more than five hundred (500) dollars to the person aggrieved thereby, to be recovered in any court of competent jurisdiction, in the county where said offense was committed; and shall also, for every such offense be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined not to exceed five hundred

(500) dollars, or shall be imprisoned not more than one year, or both; and punishment upon an indictment, shall be a bar to either prosecution respectively."

Motions to dismiss the appeal and to affirm pro forma for want of a sufficient abstract were taken with the case and are denied.

The appellee operates what is known as a "Five and Ten Cent Store" in Springfield. Among its departments is a lunch counter at which food and drink are served. The counter was in the form of a hollow rectangle, 30 to 35 feet long, with a marble top 18 or 20 inches wide, in the center of which rectangle were steam tables from which the food was served and the working space for the waitresses. High stools with a seat about 10 inches in diameter and without arms or back were located quite close together all around the outside of the counter. About four feet from the counter and parallel thereto and with no partition or division from the stools, was a row of 19 chairs, with backs and wide shelf arms on the right side, on which dishes could be placed, such as are found in many cafeterias. The food was all served from inside the counter by waitresses, and whether it was to be eaten while seated on a stool or in a chair it was of the same quality and price and served by the same waitresses. On the wall, just over the row of chairs, was a conspicuous placard on which was printed: "The management reserves the right to seat their patrons."

The chairs in question were not reserved for colored

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people but were used indiscriminately by colored and white persons.

About the first of July, 1920, Overby, accompanied by another young colored man, entered appellee's place of business and seated themselves upon stools at the same counter and called for food and drink. They were informed by the parties in charge of the lunch counter that they could not be served at the counter but that if they would seat themselves in chairs they would be served. Overby and his companion declined to occupy the chairs and left the place without being served, and Overby instituted this proceeding as the result of the occurrence.

There is a sharp conflict in the testimony as to what

was said by the parties at the time of the occurrence, Overby testifying that the parties in charge of the lunch counter told him "We do not serve colored people at this counter. If you want to be served, get over there against the wall," and that the Manager of the place said, "I don't serve colored people at this counter; there is a lady you might be objectionable to her. If you want to be served you get over against the wall." The making of these statements is denied by appellant's witnesses, who state that Overby's attention was called to the sign upon the wall and that nothing was said about their colored people.

While an eating house or restaurant is sufficiently public in its nature to be subject to legislative and municipal regulations, yet it is a private enterprise, the private property of the proprietor and in the very nature of things the proprietor must exercise control over the place and the patrons. It follows as a necessary incident of such control that one operating such eating house or restaurant may make all reasonable rules as to the method of serving patrons and conduct of the business as long as they do not conflict with any legislative or municipal enactment. Overby's right in appellee's lunch counter was no greater or no less than those of a white man. His color gave him no greater rights there than a white man would have under

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the same circumstances. It would not be seriously contended that a white man had an absolute right to be seated and served at a particular seat in a restaurant, or to be served by any particular waiter, or to have any particular kind of chairs or dishes. A white man would not have a right to insist over the proprietor's protest, upon sitting down at a table where for any reason, the proprietor might think him uncongenial to the other guests or when his presence might interfere with the enjoyment of the other guests. A white miner or a mechanic in his soiled working clothes, while having a right to service, would have no right to insist upon seating himself over the proprietor's protest in just a position to ladies dressed in delicate fabrics which might be easily soiled nor would a white lady no matter how reasonable or well dressed have a right to insist upon being

seated at a table with a party of business men who were discussing their business affairs. In the very nature of things, discretion in seating their patrons must be vested in the management of such concerns, and the posting of the placard "the amnagment reserves the right to seat their patrons" gives appellee no greater right than he already had under the law. It only called the attention of the proprietor's patrons that the management intended to avail themselves of that right. It was a rule which applies to all alike whether white or colored.

Having a right to seat appellees white patrons it necessarily follows that appellee had a right to seat its colored patrons as long as it did not isolate them from the whites but furnished them seats used indiscriminately by whites and colored people.

The vital question in this case was a question of fact and it was put directly up to the Jury by proper instructions, and we would not be justified in disturbing their finding which has received the sanction of the Circuit court.

The judgment is affirmed.

226 I.A. 627

General No. 7382

Agenda No. 31

October Term 1921

S. Lee Cox,
vs.

Missionfield Coal Company, a corporation
Error to the Circuit Court of Vermilion County

HEARD, J.

The cause of action in this case arose out of the fact that Defendant in Error, which is hereinafter referred to as defendant, entered upon the premises of the plaintiff in error, who is hereinafter called the plaintiff, who had a farm adjoining defendant's premises, mined and took away a quantity of coal therefrom without the consent of the plaintiff. A jury trial resulted in a verdict and judgment for plaintiff against defendant for \$270 damages, and the only question which plaintiff seeks to have reviewed is the size of the award.

In McGuire vs. Boyd Coal and Coke Co. 236 Ill. 69, the rule is laid down that the measures of damages for coal wrongfully mined beyond the limits of the mine is the value of the coal at the mouth of the pit, less the costs of loading and handling the coal from the place where it was mined to the foot of the shaft and for hoisting and dumping it into the car at the top.

It was stipulated by the parties upon the trial that 8,386 cubic feet of the vein of coal had been mined and removed by the defendant.

Plaintiff introduced evidence tending to show that 8,386 cubic feet of the vein would produce 353 tons of coal, while defendant introduced evidence tending to show that the amount of coal was 346.2 tons. Plaintiff introduces evidence tending to show that the value of the coal at the mouth of the pit was \$1.75 per ton, while defendant introduced evidence tending to

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show that such value was only 95c per ton. Defendant introduced evidence tending to show that the cost of loading the coal into the pit car was from 34.5c to 35.5c per ton, and hauling it from the place where it was mined to the foot of the shaft and dumping it into the car at the top was from

21c to 25c.

Plaintiff introduced no evidence as to the cost of these operations. According to the figures above quoted, under the rule laid down in McGuire vs. Boyd Coal and Coke Co., supra, the minimum amount of damages shown by the evidence was \$124.32, and the maximum amount was \$413.60.

The verdict of the jury being within the range of these figures we would not be justified under the evidence in this case in disturbing their findings.

The judgment is affirmed.

General No. 7385

Agenda No. 70

October Term 1921

Joseph P. Lyons, Complainant and Appellee

vs.

Mary Frances Lyons, Defendant and Appellant

Mary Frances Lyons, Appellant

vs.

Joseph P. Lyons, Appellee

Appeal from the Circuit Court of McLean County

HEARD, J.

The abstract filed by appellant in this case is a mere index. It does not set forth the bill, the evidence, or the decree and does not comply with the Rules of this court. While this Court will go to the transcript of the record for reasons to affirm a judgment, it will not go back of the abstract for reasons to reverse one. The appellant who prepares the abstract must cause it to show all errors relied up for reversal. Warren vs. Armstrong 214 Ill. App. 188.

Appellant not having filed an abstract in compliance with the rules of this court, the appeal will be dismissed.

2261A. 327

General No. 7386

Agenda No. 31

October Term 1921

Charles B. McIntosh, Appellant

vs.

Carlinville Mining Company, Appellee

Appeal from Circuit Court of Macoupin County.

HEARD, J.

This is a suit brought by appellant against appellee for services alleged to have been rendered by appellee for appellant.

A trial was had and upon the appellant closing his testimony in chief, the appellee entered a motion to exclude all of the evidence offered on the part of the appellant and for judgment in favor of the appellee. Said motion was allowed by the court, and thereupon judgment was entered by the court in favor of the appellee, from which judgment this appeal is being prosecuted. During all of the time the appellant was engaged in the performance of the services for which he has brought suit he served at various times as president, secretary-treasurer, director and manager of said company, and a part of the time held more than one of said offices at the same time.

There was no evidence that the directors of the corporation ever fixed any compensation or salary for appellant prior to the rendition of the services and it is contended that therefore appellant is not entitled to recover in this case.

In Chicago Marconi Co. vs. Boggiania, 202 Ill. 312, it is said:

"While the principle is well established, that in order to entitle an officer of a private corporation to receive compensation for the performance of the duties of his office, it is necessary such compensation should have been authorized by the board of directors or by the by-laws of the company, it is also the rule that for the performance of duties or service outside and

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apart from those imposed on him by virtue of his office, such officer may, if such extraordinary services were rendered at the request, or with the acquiescence, of the corporation, recover upon

a quantum meruit."

In *Rose Hill Cemetery Co. vs. Demster*, 233 Ill. 567 the Court says:

"The old doctrine of the common law that an agent of a private corporation could only be appointed under the common seal of the corporation, if it ever was recognized by the courts of this country, has long since given way to the modern rule which is now firmly established, that an agent of a corporation can be appointed by parol for any proper corporate purpose, and the acts of agents thus appointed within the general scope of their authority are binding upon the corporation, and all services rendered or benefits conferred at the request of its agent raise an implied promise, to enforce which an action is maintainable against the corporation.

"In justice and reason no substantial ground exists why a corporation may not make contracts and assume liabilities in any manner that a natural person might employ, except in such matters as the charter of the laws of the state prescribe a particular method of procedure. It is a well-established doctrine of the law of agency that a subsequent ratification of the act of one who assumed to be an agent supplies the want of previous authority. A corporation may ratify the act of one who assumed to act for it and thus remove the want of authority in the first instance, provided the act is one which could have been legally authorized."

Appellant in his testimony stated that the services for which he was claiming compensation were not performed by reason of the fact that he was an officer of the corporation and that the services performed were no part of his duties as such officer.

When a motion is made to direct a verdict upon the trial of an issue, the party against whom the motion is directed is entitled to the benefit of all the evidence in its favor, in its aspect most favorable to him, together with all reasonable

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inference and presumptions which may be reasonably drawn from such evidence. The evidence is not weighed and all contradictory evidence or explanatory circumstances must be rejected. *Yes vs. Yes*, 255 Ill. 414; *McCune vs. Reynolds*, 288 Ill. 188; *Plum vs. I. C. R. R.*

Co. 220 Ill. App. 554.

Applying this rule to the evidence in this case, we are of the opinion that the court erred in directing a verdict in favor of appellee.

The judgment is reversed and the cause remanded.

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226 I A. 527

General No. 7390

Agenda No. 37

October Term 1921

Swift & Company, a corporation, Plaintiff in Error

vs.

Normal State Bank, Defendant in Error

Error to McLean County Circuit Court

HEARD, J.

Plaintiff in Error brought suit in trover against Defendant in Error for the conversion of a check for \$90.52 Defendant in Error plead not guilty. A jury was waived and trial before the court resulted in a judgment for plaintiff in error against defendant in error for one cent damages and costs, to review, which judgment plaintiff in error has sued out a writ of error from this court.

In the year 1919, W. L. Hogle was a salesman and collector for plaintiff in error. He took orders for meat and collected payments from its customers. The payments were made to him by the customer's checks and in cash. At frequent intervals Hogle made itemized reports of orders and collections accompanied by a remittance of the payments. In order that he might make the remittances he was authorized to endorse customer's checks with a rubber stamp reading: "Pay to order of _____ for exchange payable to Swift & Company, by _____." After the check was stamped with this endorsement he was authorized to fill the name of the payee bank in the first blank and to write his name in the last blank. With the stamp and authority he could purchase exchange at any bank and endorse the local checks to the bank as consideration for the exchange. Hogle had no authority to use the checks in any other way or to use any other form of endorsement. He could not use the local checks or the purchased exchange for his personal use except by forgery. By this means the local banks handled the local checks and Swift & Company received one draft instead of

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many checks.

Hogle without authority endorsed the check in question in lead pencil: "Swift & Company, by W. L. Hogle." The defendant bank received the check so endorsed, collected it from the McLean County Bank at Bloomington,

the drawee bank and received the proceeds for its own account, and thereby became technically guilty of conversion.

The defendant in error interposed only the defense of mitigation of damages. Confessing the conversion, defendant in error has undertaken to mitigate the conceded damage by an attempt to prove that the check was actually used as part payment for a draft which the defendant in error issued to Hogle for Swift & Company on August 18th. Swift & Company received and cashed the draft. The question in the case is, whether this particular check was actually used in part payment for the draft.

This question was purely a question of fact to be determined by the court from the evidence in the case. We are of the opinion that there is sufficient evidence in the case to support the court's finding that the proceeds of the \$90.52 check were used by Hogle as part payment for a draft for \$385.02 which he purchased and sent to plaintiff in error and which draft was received and collected by plaintiff in error. The court having found that plaintiff in error received the proceeds of the \$90.52 check, it follows that plaintiff in error was only entitled to recover nominal damages.

Barrelett vs. Bellgard, 71 Ill. 280.

The judgment is affirmed.

General No. 7410

Agenda No. 52

October Term 1921

Minnie Zelk, Appellee

vs.

Charles Simon, Appellant

Appeal from the Circuit Court of Sangamon County.

HEARD, J.

Appellee brought suit against appellant in the circuit court of Sangamon County and filed a declaration in assumpsit consisting of one count, seeking to recover for labor and services performed in and about the household of appellant. Upon motion of appellant, a bill of particulars was filed claiming wages for work, labor and domestic services performed by appellee in and about the household of appellant from the 24th day of February 1916, to the 24th day of October, 1920, being about five years immediately preceding the filing of this suit, at the rate of ten dollars per week. Appellant filed the plea of general issue. Trial was had upon the merits and a verdict was returned in favor of appellee for the sum of \$1,690.00 and judgment was entered upon this verdict from which judgment this appeal was taken.

About twenty-three years before the beginning of this suit appellee, who is now about 47 years of age, began working for appellant in his household in the city of Chicago. Shortly after she began this service the family removed to Elkhart, Illinois, and she came with them and continued to work for Appellant in his household at Elkhart for the next nine years. About the end of that period of time appellant and his family removed to Springfield, Illinois. Appellee came with them also and continued to work in his household until she was discharged some time in 1920.

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Both parties agree that the services were performed and that they were not gratuitously performed.

Appellant was a grocer in the City of Springfield. The members of his household consisted of his wife, who died August 15, 1916, his brother William, two sons, Philip and Julius, all grown men, and one daughter, Natalie, aged about eighteen.

Appellee claims that she was never paid anything

for the services rendered.

Appellant testified that he started out prior to February 24, 1916, by paying appellee four dollars per week and that during the five years in question he paid her five dollars each and every week, sometimes by check and very frequently in currency; and that when this suit was instituted by appellee he did not owe her one cent.

Appellant was corroborated as to the making of payments by his two sons Juilius and Philip and by Chas. Anderson a truck driver at appellant's store and also by about 40 checks drawn by appellant payable to appellee which seemed to indicate a weekly payment from appellant to appellee. In explanation of these checks appellee contends that there was an agreement between herself and appellant, that appellant should each week, leave a small sum of money at his home to pay minor household expenses, such as laundry bills, insurance bills, and newspaper bills, and in pursuance to this agreement appellant gave money and checks ranging in amounts from \$4.00 to \$10.00 each week, either to appellee or to his daughter Natalie for that purpose but that none of these checks were for wages and that she retained none of the money or proceeds of the checks for her own use.

Appellee testified that while upon two occasions during the twenty-three years appellant promised to pay her wages no specific amount was ever mentioned or agreed upon. At one time in her testimony appellee testified that in June, 1917 she was working for appellant under an agreement whereby he was to

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pay her four dollars per week and board and lodging, but that he never did it but later claimed that she had not so testified. In this state of the record it was proper for appellee to introduce testimony as to the usual, reasonable and customary price paid for like services in that community, at that time, and appellee did introduce such testimony.

The court refused to give an instruction requested by appellant and such refusal is assigned for error. The requested instruction is as follows:

"The court instructs the jury that if you believe from the evidence in this case that at the beginning of the time in question the defendant had the plaintiff in his

employment upon the agreement and the understanding between the parties hereto that the plaintiff was to receive in full compensation for her services the sum of four dollars per week, and that subsequently, by agreement and understanding between the parties, the plaintiff was to render the services in question for the sum of five dollars per week, and that in pursuance of such agreement and understanding the said defendant did pay the said plaintiffs for such services in accordance with their said agreements and understanding then in such case it is your duty to find for the defendant."

The evidence was very conflicting and appellant had the right to have the jury fully instructed as to the law of the case, especially in view of the fact that appellee's witnesses had fixed eight dollars per week as the sum which appellee's service were recently worth. The refusal to give this instruction was error. The judgment is reversed and the cause remanded.

220 I.A. 628

General No. 7307

Agenda No. 23

April Term 1921

Meridian Amusement Company of Illinois, a corporation
Appellant

vs.

The Home Theatre Company, a corporation, Appellee
Appeal from Vermilion.

NIEHAUS, J.

This suit was brought by the appellant, Meridian Amusement Company of Illinois, in the circuit court of Vermilion county, for alleged pecuniary loss, which it claims to have suffered on account of the violation by the appellee. "The Home Theatre Company," of a restrictive agreement, by the terms of which, the appellee was prohibited from operating a picture show at its theatre in Danville, which is known as the "Palace Theatre;" and is located nearby the Picture show theatre conducted by the appellant, which is known as the Fisher Theatre.

It is contended by the appellant, that the violations of the restrictive agreement referred to, commenced about May 1, 1918, and continued, with the exception of short intervals, until March 13, 1920, when the appellee was finally enjoined from the further production of picture shows at the theatre mentioned. There was a trial by jury, which resulted in a verdict and judgment for the appellant; the amount of the verdict and judgment being \$250.00. The appellant claims, that the amount of damages assessed by the jury are inadequate, and prosecutes this appeal from the judgment.

The right claimed by the appellant for the recovery of damages is predicated upon the loss of profits by reason of the

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wrongful competition in carrying on the same kind of theatrical attraction by the appellee at its theatre, located close to the theatre of the appellant, where similar performances were being carried on; and thereby decreasing the attendance upon its theatre, which necessarily resulted in a loss of profit in carrying on its business. On the question of the damage which it sustained, the appellant offered evidence of the pecun-

iary receipts derived from attendance of the patrons of its moving picture shows, and the net profits realized therefrom, from March 11, 1917 to October 13, 1917; and from March 17, 1918 to October 12, 1918, and from March 17, 1919 to October 11, 1919; and also up to March 13, 1920, that being the date when the final decree for the injunction took effect, which prohibited the appellee from further picture show performances. The appellant offered to prove the attendance receipts and profits of its theatre after the injunction took effect and the appellee had ceased its picture show attractions, from April 5, 1920 to October 16, 1920. An objection was sustained to this evidence; and the evidence was not admitted. We are of opinion, that the appellant had the right to have this evidence considered by the jury on the question of the damages sustained by appellant. The evidence had a tendency to show what effect the stopping of appellee's picture shows, had on the attendance on Appellant's picture shows. In *Southerland on Damages*, it is said, that juries should be allowed to act in cases of this kind upon probable and inferential, as well as direct and positive proof. "And when from the nature of the case the amount of damages cannot be estimated with certainty, or only a part of them can be so estimated, no objection is perceived to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount so as to enable them to make the most in-

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telligible and probable estimate which the nature of the case will permit." *Southerland on Damages* Vol. 1, p. 121. "When profits are the object and inducement of a contract and known to both contracting parties so to be, such profits may be proven as a measure of damages for a breach of contract if susceptible of being proven with reasonable certainty." *C. C. & St. L. Ry. Co. v. Wood* 189 Ill. 352. Evidence showing an increased attendance and hence increased profits derived therefrom, after appellee's wrongful competition was removed, would necessarily have a tendency to show the injurious effect of such wrongful competition, and the damage resulting therefrom. We are of opinion therefore that this evidence was competent and should

have been submitted to the jury. *St. John v. Mayer* 13 How. Pr. 527; *Hitchcock v. Anthony* 38 Fed. 779; *Hoogendorn v. Daniel* 202 Fed. 431. The appellant called I. C. Davidson as a witness, and he testified that he was in the theatrical business in Danville, and had operated a theatre there since May 1, 1917. He was asked this question: "You may state if you know whether the increase in attendance on theatres in Danville—the general volume of attendance—increased or decreased for the year from May 1st 1918 to May 1st, 1919?" The Court sustained an objection to the question, and this ruling is assigned as error. We are of opinion that the objection was properly sustained. The foundation for asking such a question was insufficient; inasmuch as it did not appear, that the witness had the knowledge which the question called for, namely, of the general volume of attendance upon all the theatres in Danville, even though the increase or decrease of the general volume of attendance upon theatres in Danville, might have had a bearing on the particular matter in issue, which was whether or not the attendance on appellant's theatre was decreased on account of the wrongful competition set up by the appellee.

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The giving of appellee's instructions numbered 1 and 3 is also challenged as error. These instructions in effect told the jury that the plaintiff's profits, if any, previous to the time when the appellee commenced the operation of its competitive picture shows, were the only tests from which they could determine the question, of whether the appellant was damaged. We are of opinion, that these instructions while in harmony with the rulings of the court in excluding the evidence heretofore referred to, fix too narrow a limit concerning matters which the jury have a right to consider in determining the loss of profit; and are in conflict with the principles emphasized in the authorities cited.

For the reasons stated the judgment is reversed, and the cause remanded.

Reversed and Remanded.

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Filed April 22 1922

2261 A. 628

General No. 7317

Agenda No. 32

April Term 1921

Harry L. Nichols and Effie N. Parker, Conservators of
E. F. Nichols, Appellants

vs.

Charles H. Woodruff, Appellee
Appeal from Pike.

NIEHAUS. J.

In this case the appellee Charles H. Woodruff leased from the appellants Harry L. Nichols and Effie N. Parker as conservators of E. F. Nichols, two tracts of land situated in Pike county, in the locality known as "Blackwood Bend" in the Sny Island Levee District; both tracts were located in the bend of the Sny E'Carte stream, which runs through the bottom land composing the district. The tracts are also adjacent to the waters of Kiser Creek, which had been diverted into an artificial channel, and a settling basin constructed near these lands; and at the time of the leasing, a protective levee was in process of construction between the settling basin and the tracts in question, but had not been completed. The leasing in question, was by oral contract, in the fall of 1919. In the month of April following, a new arrangement was made between the parties, by which one of the 25 acre tracts, was eliminated from the contract by substituting therefor other land, concerning which there is no controversy. On the remaining 25 acre tract, was a growth of alsike clover. By the agreement of the parties this clover tract was to be utilized for raising corn in the season of 1920. In the beginning of May, 1920, the appellee made an effort to plow the tract in question for that purpose; first with a tractor, and afterwards with plows drawn

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by horses; and he had succeeded in plowing between six and seven acres, when a heavy rain fall set in, which resulted in a rise of the waters of Kiser Creek in the settling basin; and the entire tract upon which the appellee had been working became inundated. Appellee testified, that after the rain, 'the entire tract was flooded; and that water was running all over everything; and that they had to hurry to

get the horses out; that the water was about knee deep in the barn; that the barn was on the highest ground.' The appellee thereupon abandoned his efforts to farm the land; and went to the house of appellant Nichols to inform him as he said, that he "was done on Blackwood's Bend;" not finding the appellant at home, and left word to that effect with his hired man Kinder; and Kinder delivered the message to appellant Nichols. Afterwards the appellant assuming, that the appellee had no legal right to abandon his efforts to cultivate this land, and to raise a crop of corn thereon, employed attorneys to commence suit to recover damages from appellee; and on June 25th the attorneys employed, sent a letter to the appellee informing him, that they had been employed for the purpose mentioned, and advising him to see the appellant Nichols at once, and arrange the matter in order to avoid suit; which the appellee did, in the latter part of June. When the parties got together at that time, an adjustment was agreed upon of appellant's claim. There is a sharp conflict in the evidence as to the exact terms of the adjustment agreed upon. The appellant Nichols, testified on the trial concerning this matter as follows: "He asked me, what I wanted to do; and I told him, that the clover seed was good; and I was unable to attend to it myself, and if he would do that, I wouldn't have any claim for damage on the part of the ground that was in clover; and he said, he would cut

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the clover, and save the seed, and give me half the seed threshed." And that on appellant's own suggestion it was also agreed, that the appellee would get an early variety of corn, and plant the six or eight acres that he had plowed.

The appellee's testimony concerning the transaction was as follows: "I asked him about the business, and he told me if I would plant what I had plowed, and try to save that clover, that was all right, good enough, he would withdraw his suit. I told him I would do the best I could, and he said, that is all anybody can do."

As to which of the parties gave the correct version of the agreement reached was a question of fact for the jury. The evidence shows, that the appellee after the last agreement was made, planted corn on the six or

eight acres, which he had plowed; and that he also made efforts to harvest the clover; he first made an arrangement with Lee Main to cut the clover. Main testified, 'that he told the appellee, that he would try to cut the clover; that he looked at the land; found some weeds and some clover, and some sticks and stumps; and, that that was about all he saw; but he did not cut the clover; he did not think it could be cut.' That Woodruff afterwards came to him, and asked him, if he had cut the clover, and that he told him, he had not, and couldn't. Main also testified, that there was trash and driftwood on the land, small trash that had come in there with the flood. The appellee thereafter, tried to get two other men, to cut the clover; one of these was Milt Gwartney. Gwartney testified, concerning this matter as follows: "I went there to cut the clover on this land for Mr. Woodruff, I took my son and two machines down there. I started to cut it, took a ridge first, it was a mass of weeds. I run into some fine brush, and went a little further and ran into fine driftwood. I went on,

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and struck stumps, and I backed out of that. I found some old bundles of wheat around there. I could not see clover enough to pay, and I threwed the cycle bar up, and went home."

Complaint is made of an instruction which the Court gave to the Jury concerning the adjustment agreement. The instruction is as follows:

"The defendant claims that after the high water of May 11, 1920, he and the plaintiff entered into a new arrangement and contract, whereby the defendant was to plant corn in the portions of the clover tract which was then plowed, and whereby, also, the defendant contracted that he would cut and care for the clover seed crop on the unplowed portions of the tract if he could do so; and in consideration thereof the defendant claims that the plaintiff released the defendant from the latter's former contract to farm the land in corn. The defendant further claims that he kept and performed his contract as herein set forth; that he did plant the plowed land in corn in a reasonable time thereafter; and that he in good faith made reasonable exertions and efforts to cut and

care for the clover seed crop, but by the use of such reasonable efforts and exertions, he was not able to cut and save any clover seed. If you believe from the greater weight of the evidence that the new contract was made, as claimed by the defendant, and that the defendant kept and performed the contract, by planting the plowed land in corn in a reasonable time thereafter, and by using reasonable exertions to cut and save the clover crop, you should find for the defendant and against the plaintiff on the question of damages claimed by the plaintiff."

The appellant contends, that this instruction, was erroneous. It is clear however that it correctly presents the appellee's theory of defense; and merely submits to the jury the determination of the questions of fact connected therewith; and which are vital in the controversy. There was no question about the fact that there was a final agreement made between the parties, which was made to adjust their differences; both parties testify to this fact. The instruction submitted to the jury the question, whether the agreement was made, as testified to, by the appellant, or as testified to, by the appellee; and if they found that the agreement was, as claimed by the appellee, then to determine from the evidence whether the appellee had complied with it. We find no error in the instruction. The jury by their verdict found

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these question of fact presented for the determination of the jury, and they found in favor of the appellee; and they were fully warranted in such finding from the evidence. The finding of the jury on these questions was decisive of the controversy.

In this view of the case, it is not necessary to discuss the other questions raised, concerning the general rights and duties of tenants in the cultivation of lands leased; or the extent of appellant's right of recovery under the Bill of Particulars. The Court properly rendered judgment on the verdict; and the judgment is affirmed.

Affirmed.

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General No. 7323

Agenda No. 35

April Term 1921

The Town of Griggsville, Appellant

vs.

George R. Newman, Appellee

Appeal from Pike.

NIEHAUS, J.

This is a prosecution brought by the appellant Town of Griggsville in Pike County, on the relation of Williard Nesbitt, Commissioners of Highways, against the appellee George R. Newman for an alleged obstruction of a public road, by encroachment thereon by the appellee. The claim of the appellant being that the appellee built his fence beyond the line of the public road, and into the public road; and after notice to that effect by the Commissioner of Highways, failed to remove the same.

This case was in this court on a previous appeal; and the judgment from which the appeal was taken, was reversed and remanded; Town of Griggsville v. George R. Newman, 214 Ill. App. 653. After re-instatement of the case in the trial court, another trial was had, which resulted in a judgment and verdict, finding the appellee not guilty; from this judgment an appeal is now prosecuted. Various reasons are urged for a reversal of the last judgment. The first point made by the appellant is that the verdict is contrary to a clear preponderance of the evidence. This contention is based mainly on the fact, that the appellant had the greater number of witnesses to testify upon its side of the controversy. It is familiar law however, that the greater number of witnesses do not necessarily make a preponderance of evidence in favor of the side upon which they testify.

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Witnesses, who testify in a case are not equal in credibility; nor do they have equal knowledge concerning the matters about which they testify; nor are they equally intelligent, and fair, and truthfully inclined; all these elements and others enter into the question of the weight of the evidence, and in determining the credence which the jury will give to the matters concerning which they testify. Applying the usual tests, which the jury had a right to apply, it is evident that the greater num-

ber of witnesses did not carry the greater weight of the evidence in the judgment of the jury. As has often been held, in a case like this, where there is a sharp conflict in the evidence as to the controlling facts, it is peculiarly the province of the jury to determine where the weight of the evidence lies. The jury found in this case that the weight of the evidence was on the side of the appellee; and the finding of the jury on that point, was sustained by the trial court. This court would not be justified under the circumstances here presented, in holding that the verdict was manifestly against the weight of the evidence.

It is contended, that the trial court erred in admitting over the objection of the appellant, evidence of the varying width of the road in question, north and south of appellee's land. While it is true, that the variance in the width of the highway at points north and south of the appellee's land, was not relevant to the main issue, namely, whether the appellee built the fence in question along the line of the former fence, which was conceded to be on the line of the road, or built it about four feet further out in the highway, it is a controverted question in the evidence, where the line of the former fence was, which was conceded to be on the line of the road. Under these circumstances the lines of the road above and below the appellee's land might have some bearing on locating the line of the road along the appellee's land. The

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court limited the purpose of the admission of the evidence by instructing the jury, that the measurements as to the width of the road in controversy, and the road north and south of the Newman land, were admitted in evidence only for the purpose of fixing the location of the old and new fences, and certain land marks such as posts, stumps and trees mentioned by the witnesses; and not for the purpose of showing the width of the road in question along the Newman land. Insofar as it had any tendency to show the location of the matters referred to, we think the evidence was not incompetent.

Appellant criticises some of the instructions given for appellee, and insists, that the language used, may have misled the jury into erroneous conceptions of the

law. We do not think the criticism is justified. The instructions must be considered all together, and as a series; considered in this way, they state the law with substantial correctness; and we do not think, that the jury received an erroneous impression concerning them, nor wrongfully applied the law to the facts.

It is also contended, that the court erred in not granting a new trial on the strength of the matters contained in the affidavit of Williard Nesbitt, which recites certain alleged newly discovered evidence. This newly discovered evidence was inreference to certain facts testified to, on the trial by the witnesses Galloway, Osborn and Weeks. Affiant averred in the affidavit, that he expected to show these new matters by the same witnesses; and others who were not named in the affidavit. Appellant had an opportunity to elicit the matters set forth in the affidavit on cross examination of these witnesses, when they were on the stand, and testified at the trial; or by calling them afterwards in rebuttal. The affidavit was clearly insufficient to warrant the court in granting a new trial.

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It is also urged, that it was not proper to render a judgment against the appellant town for costs. The judgment for costs was in accordance with the provisions of Section 6, Article 5 of Chapter 139 Revised Statutes. *Town of Anchor v. Stewart* 158 Ill. App. 205.

We find no reversible error in the record and judgment is affirmed.

Affirmed.

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General No. 7331

226 I.A. 328
Agenda No. 44

April Term 1921

John Bond, Appellee

vs.

J. H. Austin, Appellant

Appeal from Ford.

NIEHAUS, J.

This is a suit to recover damages for an alleged breach of warranty made by the appellant in the sale of a stallion to the appellee. There was a trial in the circuit court of Ford county, which resulted in a verdict and judgment for \$200.00 in favor of appellee; and this appeal is prosecuted from the judgment. The appellant contends, that the trial court erred in the admission of secondary evidence, namely in allowing the appellee to testify from his recollection as to the number of mares, which were served by the stallion; also that it was error to allow appellee to refresh his recollection from a memorandum which he had made. The testimony of the appellee concerning the number of mares served based upon his recollection, was not secondary evidence, even though he may have kept an account of these matters in a book. It is elementary, that the recollection of a witness concerning a fact or a transaction in which he participated, or of which he has personal knowledge, is the best evidence on that subject. This evidence therefore, was the best evidence, of which the nature of the case was susceptible. Nor was it error to allow the appellee to refresh his recollection from a memorandum he had made concerning matters about which he was competent to testify. *Iroquis Furnace Co. v. Elphicke & Co.* 200 Ill. 411; *Diamond Glue Co. v. Wietzychowski* 227 Ill. 338; *Brown v. Galesburg B. Co.* 132 Ill. 648

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Callahan v. Conran 172 Ill. App. 261.

It is further contended, that the record does not show that the appellee was qualified to testify concerning the market value of the stallion in question. It appears from the evidence, that the appellee had been in the business of buying, selling and standing stallions, for about twenty years prior to the time of his testimony. This was sufficient to qualify him to answer questions

concerning market values.

It was a controverted question in the case whether the appellant had warranted the stallion to be a foal getter, and a first class coverer. This was the main issue and concerning this matter, there was a conflict in the testimony of the parties to the suit; the appellant claiming, that he made no warranty at all of the stallion's qualities in that respect. There is evidence corroborating appellee's version of the matter; and apparently more evidence corroborating appellant's testimony on that question; but it was a fair question for the jury to decide, where the determination of the matter involved the credibility of the witnesses, who testify for and against the respective parties. The jury believed the appellee, and this court would not be warranted in holding that they should have believed the appellant; and we would not be warranted in holding under these circumstances that the verdict is manifestly against the weight of the evidence. *Harroun v. Benton* 197 Ill. App. 140; *Welsh v. Chicago City R. Co.* 195 Ill. App. 146; *Pixley v. Swail* 194 Ill. App. 151; *Village of Bolton v. Lewis* 194 Ill. App. 71.

We find no error in the giving or refusal of the instructions in the case; and no reversible error is disclosed by the record. The judgment is affirmed.

Affirmed.

226 I.A. 628

General No. 7340

Agenda No. 53

April Term 1921

Edward Wolf, Appellee

vs.

Turner State Bank, Appellant

Appeal from Christian.

NIEHAUS, J.

The appellee Edward Wolf commenced this suit in replevin in the circuit court of Christian county to recover possession of a promissory note of the alleged value of \$4000.00, of which he was the maker; and which he claimed, was illegally detained from him, by the appellant, Turner State Bank. The main issues in this controversy were, whether the appellee was the owner of the note in question, or entitled to a return of the note, which he claimed, he placed in the hands of the cashier of the appellant bank, upon certain conditions, which were to be complied with by the Daniel Hays Land Company, and which he alleged, were never complied with; or whether the appellant bank, was a legal holder of the note in due course, for value, and without notice of any infirmities effecting the execution or negotiation of the note. It appears from the evidence, that prior to the making of the note, two representatives of the Daniel Hays Land Company, Yates and Brainard, entered into negotiations with the appellee, in June 1919, for the purpose of selling him some land, which the company claimed to own in the State of California. The initial negotiations on the part of the company, were by Yates; but subsequently carried on and brought to a conclusion by both Yates and Brainard. The appellee testified, that on the evening of June 16, 1919, he went to appellant's place of business, to see

Page 1

L. E. Swigert

appellant's cashier, and sought his advice concerning the matter; and told him about the land deal which he had on hand; and that Yates wanted him to leave the note at the bank on deposit until the contract for the purchase of the land was returned. To use appellee's own language: "I told him, I didn't want to leave a note, that would cause any trouble; if there was any chance; he

said there wouldn't be any trouble; he said you leave the note here, and it will be perfectly safe; he said just draw up a note payable to yourself, and leave it; I told him, I had no contract; it was to be sent to the company for their approval; and if the contract was not changed by the company, or the deal was off, the note was to be returned." It does not appear clearly from the appellee's testimony, just what changes were to be made in the contract, which the representatives of the Land Company wanted the appellee to sign. According to the testimony of the Land company's representative, Brainard, the change in the contract which was to be made, was this: the time of the appellee's trip to California to inspect the land, was to be extended from ninety to one hundred and twenty days; and Brainard also testified, that the appellee had stipulated at that time, that the company should sign the contract before he did; and that he wanted the company's signature as evidence of their good faith, before he signed it. And Swigert testified concerning the return of the contract to the appellee, as follows: "As to mailing the contract back, the arrangements were made with Mr. Brainard; I understand, that it was to be either mailed back to Mr. Wolf, or the bank." It is claimed by the appellant, that on the evening in question, at the end of the negotiations which took place in a room of the bank, that an understanding was reached that the company should have the right to have the appellee's note discounted by the bank,

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so that the company would immediately receive the money therefrom; and that if the appellee after his inspection trip to California didn't want the land, he would be entitled to receive back his money from the company. Swigert testifies in reference to this matter as follows: "Mr. Wolf said to Mr. Brainard, that he would be willing to put up a note and leave it with me until after his visit to the land, and inspection of it; Mr. Brainard positively informed him he would not consider such a thing under the circumstances; that he must put up a note that was payable to the cashier, on which they could get the cash, a note that could be discounted. They discussed the proposition further and finally Mr. Wolf proposed to Mr.

Brainard that if he would endorse the note with him, he would execute the note; Mr. Brainard wrote out the note and handed it to Mr. Wolf and Mr. Wolf signed his name to the note and turned it over and endorsed it and Mr. Brainard immediately endorsed it himself." He also testified, that "the note was then given to me or the bank, to be discounted; no special arrangements had been made before that; it was negotiated at that time **** then I for the bank issued a time certificate for \$4000.00 payable to the order of the Daniel Hays Company, at Mr. Brainard's direction; I issued it the same evening that the conversation was held ***** I handed Mr. Brainard the certificate just after Mr. Wolf had left." The appellee denied, that any other agreement or understanding was had concerning the note in question, except the one testified to by him; and that the note was negotiated without his knowledge or consent; that he was not present when any negotiation of the note took place; and that he did not know of the issuance of a certificate of deposit for the same to the Daniel Hays Land Company.

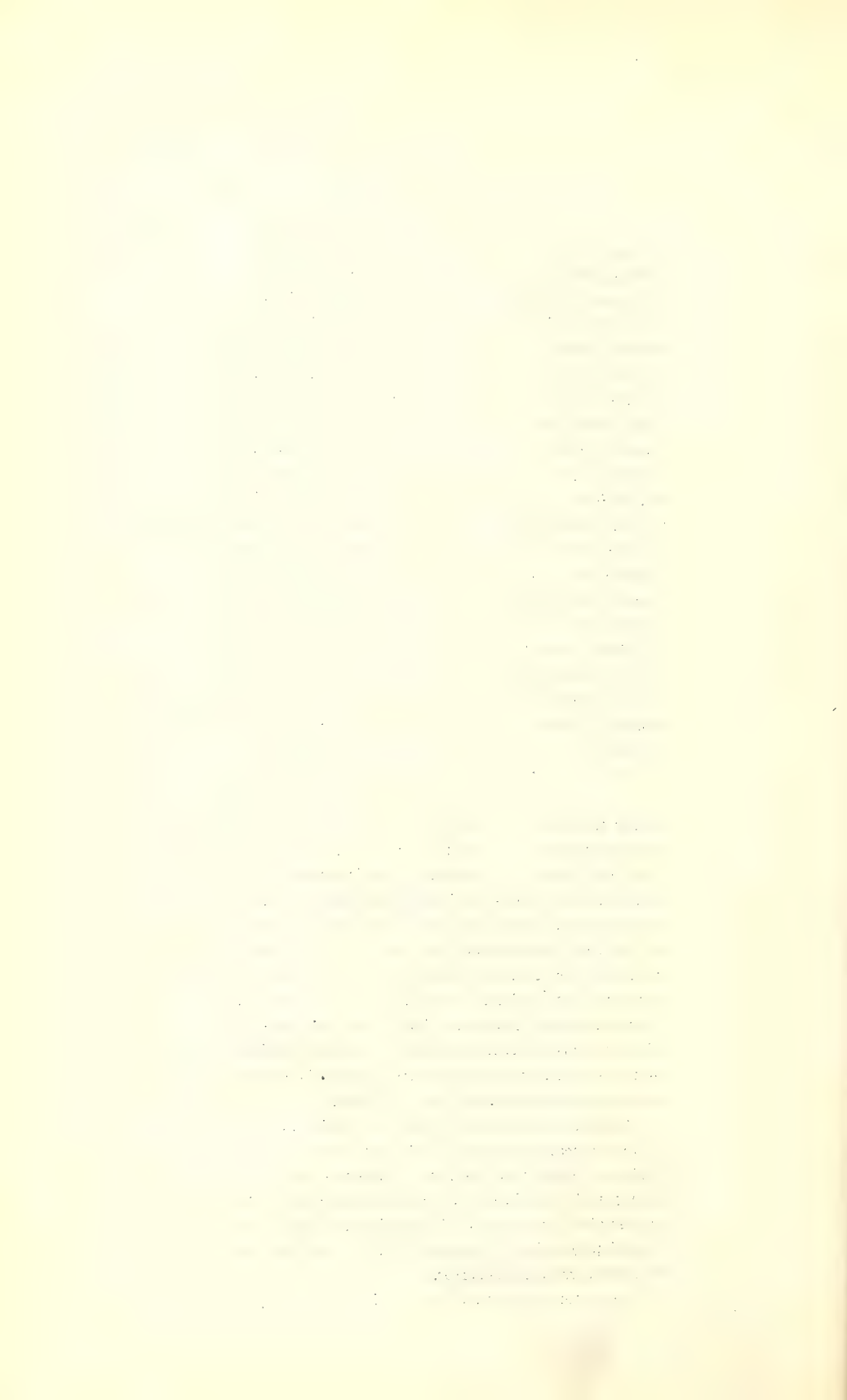
There was a trial by jury, which resulted in a verdict

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finding the issues for the appellee, and judgment was rendered upon the verdict; this appeal is prosecuted from the judgment. A reversal of the judgment is urged for various reasons. It is contended, that the trial court erred in allowing the appellee to testify concerning the real property which he owned. This testimony insofar as it indicated the financial ability of the appellee to pay the note, and established the fact of the value of the note, was not erroneous. But if there was error in admitting this evidence, such error was clearly waived by the appellant, when on cross examination he elicited from the appellee the same facts in detail.

Complaint is also made, because a question was asked the witness Swigert, about the financial standing of Brainard. While this was not a legitimate subject of inquiry under the issues, the question asked, and the answer given, did not result in anything that can be considered prejudicial to the rights of the appellant, and therefore, was harmless error.

Appellant insists, that the verdict of the jury is



against the weight of the evidence. The record discloses, that there was a sharp conflict in the evidence concerning the details of the transaction which resulted in appellee's making the note in question, and putting it into the possession of appellant's cashier; none of the three witnesses, who participated in the transaction, agree in their testimony about the transaction. It was therefore the peculiar province of the jury, who heard and saw the witnesses, to determine where the truth in the controversy lay; and the jury was in the best position to do so. The circumstances apparently corroborated appellee's version of the transaction; and no reasonable explanation except the testimony of the appellee, appears from the evidence, why if the Hays Land Company was to receive the

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proceeds of the note at once, the note was not made payable to the company, instead of to the order of the appellee himself. It is clear at least, that the court would not be justified in saying from the proofs in the record, that the verdict was against the manifest weight of the evidence.

Complaint is made of the giving, and the refusal of instructions. The second instruction given for appellee, is criticised because the question of appellant's knowledge of a failure of consideration, is not coupled with the time of the purchase of the note. The omission is not important, inasmuch as all the evidence bearing upon the question of knowledge, is to the effect, that whatever knowledge appellant's cashier had of any infirmities in the note, he had at the time of the negotiations and purchase.

Appellant also contends, that the third instruction is erroneous, because "nowhere in the instruction is there anything stated with reference to the proof of failure of performance of the condition upon which said note was delivered." The instruction does indirectly assume, that the condition upon which the note was left with the cashier was not performed; but the evidence is conclusive upon the point, that no contract was signed by the appellee; and no deal closed by the appellee after the note had been given. Assuming as we must, that the jury believed the testimony of the appellee concern-

ing the conditions upon which he left the note with the appellant's cashier, the jury could not have been misled into error by the inference that the instruction assumed, that the condition had not been fulfilled. The assumption in an instruction of a fact, which is conclusively shown by the evidence, is not a sufficient legal basis for reversal of a judgment. *Martens v. Public Service Co. of Northern Illinois* 219 Ill. App. 160; *Peterson v. Elgin*

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A. & S. Traction Co. 238 Ill. 403; *Chicago Screw Co. v. Weiss* 203 Ill. 536; *Citizens Ins. Co. v. Stoddard* 197 Ill. 330; *Illinois Central R. Co. v. King* 179 Ill. 91; *Morris v. O'Brien* 81 Ill. App. 203.

Appellant's criticism of the other given instructions for appellee, we think is without merit. We find no error in the refusal of appellant's instructions which were not given.

The record does not disclose any reversible error; and the judgment is affirmed.

Affirmed.

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Filed April 22-1922

236 I.A. 328

General No. 7348

Agenda No. 59

April Term 1921

Benton Tipword, et al, Appellees

vs.

Chas E. Springstun, et al, Appellants

Appeal from City Court of the City of Pana.

NIEHAUS, J.

The appellees, Benton Tipword, E. T. Mahin and Orlin Morr as trustees of the Methodist Episcopal Church South, of the State of Illinois, a religious corporation, filed a bill in equity against Charles E. Springstun, the appellant, and Peter Sanders, in the City court, of the City of Pana in Christian County, alleging in the bill, that the church mentioned in its corporate capacity, is the owner of certain real estate in the City of Pana, which is described in the bill; and which theretofore, had been used for the purpose of religious worship; and that said premises contained a dwelling house, which had been used as a parsonage in connection with the church; that the congregation constituting the church at Pana, had become so reduced in numbers, that it was unable to support and maintain a church; and that therefore the church building had been removed, and the congregation dissolved; leaving the dwelling house or parsonage remaining on the premises; and that after the dissolution of the congregation, the management charge and control of the real property mentioned passed into the general charge and control of the Annual Conference of the Methodist Episcopal Church in Illinois, which Conference by and through its trustees has general charge, and exercises supervision and control; that at a quarterly meeting of the conference held at Donaldson Church,

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in the Moccasin charge of the Salem district, pursuant to the by-laws, rules and customs of the church, and by a resolution lawfully adopted, it was decided that the church property mentioned, should be disposed of; and that thereupon the trustees of the church were authorized to make sale thereof, and to execute and deliver all necessary deeds of conveyance therefor; that the trustees placed the property described with Baldwin

& Baldwin, agents, for sale; and that said agents made an oral contract with the appellant for the sale of the property referred to, by the terms of which, the appellant agreed to purchase the same for \$1000.00; that \$100.00 of said purchase price was deposited by the appellant with said agents, under said contract to "bind the deal." That afterwards said agent acting for the trustees tendered a formal written contract of purchase to the appellant, and requested him to execute the same; but that he declined to do so; that thereafter the trustees procured and submitted to the appellant, an abstract of title of the property; and also executed and tendered him a deed for the same; but that the appellant has steadily refused to accept the same, and to complete the deal. The bill also alleges, that while these negotiations between Baldwin & Baldwin, representing the trustees, and the appellant, were being carried on, the appellant surreptitiously, and secretly, and without the knowledge permission or consent of the trustees, fraudulently represented himself to be the owner of the property contracted for, and rented the dwelling house on the premises to divers persons and collected divers large sums of money as rentals for the same; that the defendant Peter Sanders was one of these; and that Sanders was in possession of the dwelling house referred to on the 6th day of May 1918; that the trustees upon learning of the course pursued by the appellant, caused a notice to be

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served on Sanders for the possession of the premises; and that Sanders afterwards attorned to them; and thereafter paid rent to them; that thereupon, the appellant instituted an action of forcible detainer before a justice of the peace to recover possession of the property from Sanders; and did obtain a judgment for possession against him; but that Sanders has appealed from this judgment to the city court of Pana, which appeal is pending and undetermined. The bill further alleges that appellant is claiming, that he has acquired some right or interest in the property in question superior to that of the trustees, by virtue of his uncompleted oral contract of purchase; and that the appellees fear and believe, that if the appellant is allowed to

proceed in his action of forcible detainer by reason of the limited defense available to Sanders, that their title may be clouded by this suit; and that the value of the property may be materially affected thereby; and that it may cause irreparable injury and vexatious litigation. The bill prays for an injunction to restrain the appellant from further prosecuting the forcible detainer suit against Sanders, and for an accounting of the rents collected by him, and that the title and possession of the appellees may be quieted and for other relief. The defendant Peter Sanders entered his appearance in the case, but did not file any answer to the bill. The appellant, filed an answer, in which he admits that he purchased the premises for \$1000.00 and paid \$100.00 in cash on the purchase price; and avers, that under the terms of purchase the appellees were to submit a properly certified abstract of title, showing merchantable title thereto in the Methodist Episcopal Church South, of the State of Illinois; and that when such abstract was presented with a warranty deed with full covenants of warranty, conveying to the appellant the premises referred to, the appel-

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lant was to pay \$900.00 as the full purchaser price of the property. He also avers, that it was agreed that the appellant should immediately enter into the possession of the premises in question, pending submission of the abstract; and that the appellees accepted the \$100.00 paid, and placed the appellant in full possession of the premises. He also avers, that the appellees have never tendered him an abstract showing merchantable title in the church, nor a proper warranty deed; that he has at all times been ready to complete his part of the purchase of the property, when the appellees tendered him the abstract and deed required by the contract of purchase; and he also avers, that he had full right and lawful authority to enter into the possession of the premises at the time he did enter upon the same; and that he continued under such lawful right in the undisputed possession of the premises until about the 1st day of June 1918.

Upon a hearing of the case, the Court rendered a decree finding the facts substantially as set forth in the

bill; and finding, that the appellant entered on the premises and took possession of the same without any legal right or authority; and without the knowledge and consent of the appellees; and that he collected as rent the sum of \$78.00, of which sum he had returned \$2.00, leaving a balance of \$76.00 in his hands; and that he should account to the appellees for said balance; and that he was not entitled to recover for any money expended by him upon said premises during the time that he had wrongfully possessed himself thereof. The decree also finds the facts in relation to the tenancy of Peter Sanders substantially as stated in the decree; and enjoins the appellant from further prosecuting the forcible detainer suit.

The evidence adduced on the hearing of the case fully sustains the findings of fact in the decree. The appellant had

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no legal right under his contract to purchase the premises to take possession, nor does the evidence show any other agreement, authority or consent by the trustees, to take possession or from which a right to take possession could be inferred. The appellant was a mere trespasser upon the property; and therefore had no right to lease the same, or collect, or retain the rentals thereof; and the decree properly compelled him to account for the same. *Clay v. Hammond* 199 Ill. 370. Being a mere trespasser, he could not legally recover any money that he had expended in connection with his wrongful entry upon or possession of the premises. It is apparent also, that as a matter of law, Sanders being his tenant, could not legally dispute the right of appellant as landlord. The Methodist Episcopal Church South, although the real owner of the premises, is not a party to this forcible detainer suit; and it cannot assert its rights. The legal result of the forcible detainer suit therefore, against Sanders, would be a judgment in favor of the appellant whereby he would regain his wrongful possession of the premises; and the judgment thus obtained would necessarily be a cloud upon the right and title of the real owner, the Methodist Episcopal Church South. *Alcott v. The American Straw Board Co.* 237 Ill. 55; *Boley v. South Park Com.* 215 Ill. 200; *Griffith v. Griff-*

ith 198 Ill. 632; Shultz v. Shultz 159 Ill. 663; Rigdon v. Shirk 127 Ill. 411. And it is clear also, that in the situation referred to, the appellees would be involved in other litigation, to remove this cloud, and regain the possession and control of the premises. The right to relief by injunction under these circumstances is clearly established. Goodnough v. Sheppard 28 Ill. 81; Wangelin v. Goe 50 Ill. 459; Hodgen v. Guttery 58 Ill. 431; Cin. LaF & C. R. R. Co. v. D. & V. Ry. Co. 75 Ill. 113; Kesner v. Misch 107 Ill. App. 408.

We find no error in the decree and same is affirmed.

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April 22-1922
General No. 7357

226 I.A. 329
Agenda No. 8

October Term 1921

J. C. Ross, Plaintiff in Error

vs.

George B. Maston, Defendant in Error
Error to Vermilion

NIEHAUS. J.

The Plaintiff in Error J. C. Ross, filed a bill in equity in the circuit court of Vermilion county against Defendant in Error George B. Maston, to which a demurrer was sustained; and he thereupon, by leave of court filed an amended and supplemental bill, in which he set up in detail the history and course of proceedings in the circuit court on appeal, of a certain cause which the Defendant in Error brought against the Plaintiff in Error, and his wife Ellen Ross; and in which the Defendant in Error sought to recover a commission for bringing about the sale of a 320 acre farm, alleged to have been owned by Defendant in Error's wife Ellen Ross, which litigation finally resulted in a judgment in the circuit court of Vermilion county against the Plaintiff in Error for \$320.00, from which the Plaintiff in Error prosecuted an appeal to this court; and this court affirmed said judgment; Maston v. Ross 201 Ill. App. 355.

The Plaintiff in Error asserts in his bill, that the judgment finally recovered against him, and which was affirmed by this court was illegal, void and unconstitutional; that the Defendant in Error threatened to issue an execution thereon, and attempt to collect the judgment; and threatened to bring, and did bring action on the appeal bond given on the

Page 1

last appeal; and furthermore, that an action on the appeal bond had been brought after the original bill to which a demurrer had been sustained was filed. That personal service in the latter case had been obtained on J. S. McFerren the surety on the appeal bond, but not on the complainant; and that a judgment had been obtained against the surety for \$433.19, which was the full amount of the judgment against the Plaintiff in Error, and costs; also that the judgment against McFerren had already been col-

lected by the Defendant in Error; and alleges that the Defendant in Error, is insolvent; that the Plaintiff in Error is liable to McFerren, and will have to re-pay the amount of the judgment recovered against McFerren; and that unless restrained by injunction, the Defendant in Error Maston, will spend the money so collected by him, and prevent Plaintiff in Error from recovering the same; and thereby deprive the Complainant of his property without due process of law.

A supplemental bill filed, prays that the court will restrain and enjoin the Defendant in Error, from spending the money collected on said judgment against said McFerren; and from preventing the Plaintiff in Error from recovering the amount; and, that the court will order the Defendant in Error to return to the Plaintiff in Error the full amount of the money so collected by him on the judgment referred to, together with costs. A demurrer was filed to the supplemental bill and sustained by the court; and the bill was dismissed for want of equity. From the order of the court dismissing the bill a writ of error is now prosecuted.

It is sufficient to say concerning the judgment rendered against the Plaintiff in Error for the commissions claimed by the Defendant in Error, and all the questions re-

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lating to the liability of the Defendant in the judgment, for said commissions, and concerning the jurisdiction of the court to render the judgment and to adjudicate the matters involved, were finally settled by the opinion of this court affirming the judgment; and have therefore become *res adjudicata*; and cannot be made the subject of review by bill in chancery. There are no facts stated in the supplemental bill, from which the inference could be drawn, that the judgment against McFerren the surety on the appeal bond referred to, was not regular, legal and binding; a court of equity would have no jurisdiction to interfere with the enforcement of such a judgment. Nor would a court of equity, have any jurisdiction to exercise control over the money collected by the Plaintiff on such a judgment. Nor would a court of equity under the averments of the supplemental bill have any power to order the money collected by

the Defendant in Error be returned to the Plaintiff in Error. It is clear, that the supplemental bill is wholly without equity; and the court properly sustained the demurrer to the bill. The order of the court dismissing supplemental bill is therefore affirmed.

Affirmed.

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2261.A. 529

General No. 7364

Agenda No. 14

October Term 1921

John Thomas, Appellee

vs.

W. H. Kraft, Appellant

Appeal from McLean.

NIEHAUS, J.

John Thomas the appellee brought this suit against the appellant W. H. Kraft, to recover damages, which he claims to have sustained, on account of injuries to his horse, buggy and harness, resulting from a collision with the automobile of appellant; which collision he alleges, was brought about, by the negligence of the appellant, in driving an automobile at an excessive rate of speed. There was a judgment before the justice of the peace in favor of the appellee; and appeal taken to the circuit court, where a trial de novo was had, which resulted in a verdict by the jury, finding the appellant guilty, and assessing appellee's damages at \$177.50. The court rendered judgment on the verdict; and this appeal is prosecuted from the judgment.

One of the errors assigned, which is urged as a ground for reversal of the judgment is, that the counsel for the appellee by his interrogation of the appellee as a witness brought out the fact, that the appellant was protected in whatever judgment might be rendered against him, by insurance. It has been repeatedly held, that to bring this matter to the attention of the jury in an action of this kind is reversible error. *Bishop v. Chicago Junction Ry. Co.*, 289 Ill. 63; *McCarthy*

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v. Spring Valley

Coal Co. 232 Ill 473; *Mithen v. Jeffrey* 259 Ill. 372; *Turner v. Lovington C. M. Co.* 156 Ill. App. 60; *Fuller v. Daragh* 101 Ill. App. 664; *Emery Dry Goods Co. v. De Hart* 130 Ill App. 234; *Wullner v. Smith-Lohr Coal Co.* 156 Ill. App. 486; *Vacker v. Yeager* 151 Ill. App. 144. It is true the court sustained objections to those portions of the answers which referred to the insurance and to the insurance company; and also ordered the answers stricken out. This did not remove the effect of the answers from the minds of the jury, nor could it remedy the harm

which had been done. It must also be pointed out that it was error, to allow the witness Lee Bozarth, to give his opinion about the speed at which the appellant was driving his car, without being qualified to testify on that subject by a preliminary examination showing, that he had sufficient knowledge concerning the matter of the speed of automobiles to enable him to form a correct judgment on that subject. *Barnett v. Levy* 213 Ill. App. 129.

For the errors indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

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General No. 7365

Agenda No. 15

October Term 1921

Henry H. Hansen, J. C. Mitchell and F. J. Parr,
Plaintiffs in Error

vs.

John R. Bradshaw, Defendant in Error
Error to Sangamon.

NIEHAUS, J.

The Defendant in Error John R. Bradshaw on the 20th day of May 1920, had a judgment entered by confession in the circuit court of Sangamon County for the sum of \$29,382.85, against Henry N. Hansen, J. C. Mitchell and F. J. Parr, on a judgment note and the power of attorney, which is the basis of the controversy. The note and power of attorney is as follows:

Decatur, Illinois, Dec. 31, 1919.

\$26,500.00.

On March 1st after date, for value received, we or either of us promise to pay to the order of Jno. R. Bradshaw, at the Milliken National Bank, twenty-six thousand five hundred dollars, at said bank in Decatur, Ill., with interest at the rate of seven per cent per annum from date if not paid when due.

And to secure the payment of said amount we hereby authorize, irrevocably, any attorney of any court of record to appear for us in such court, in term time or vacation, at any time hereafter, and confess a judgment without process in favor of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs, and 10 per centum attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment; hereby ratifying and confirming all that our said attorney may do by virtue hereof. And we hereby authorize said bank at any time, at the election of its president, cashier or any other officer thereof, to apply toward the payment of this note whether due or not, any money which said bank may have in either of our deposit accounts.

Henry N. Hansen,
J. C. Mitchell,
F. J. Parr.

(Documentary stamps, cancelled \$5.00; 10c; 10c; 10c.)

At the May term of the circuit court in 1921, Henry N. Hansen, one of the defendants in the judgment, made a motion

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in writing setting forth in the motion the grounds upon which he claimed the right to have the judgment opened up, and to plead matters in defense thereto. Afterwards, the other defendants in the judgment, H. C. Mitchell and F. J. Parr, also filed their motion in writing together with their affidavits in support thereof to the same end. Upon the hearing of the matter, one of the defendants, J. C. Mitchell, was called as a witness on behalf of the plaintiff, and was examined concerning the matters contained in his affidavit, which had been filed in support of his motion to set aside the judgment. The Bill of Exceptions shows, that the separate motions of the parties were considered together as one motion and denied. A Writ of Error is prosecuted from the order of the court denying the motion. The Plaintiffs in Error claim the right to have the judgment opened up and to plead in defense. The right of the appellants, to have the judgment opened and to plead, depends entirely upon whether the affidavits of the parties, filed in support of their motion contain matters which show directly or by reasonable inference that the Plaintiffs in Error have a meritorious defense to the judgment, or some substantial part thereof. We find that the following statements of facts appear from the affidavit of the Defendant Henry N. Hansen, which was part of his motion; "Fourth, the note and power of attorney was extended on to-wit the 3rd day of March 1920, for a consideration of \$1500.00, which was paid to John R. Bradshaw, and the said extension of said note and power of attorney has not expired. Fifth, there is no interest due until the extension of the time expires; but that said judgment has a large amount of interest computed in said judgment." The affidavits of the other defendants in the judgment are corroborative of these verified averments. The

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judgment
note in question was for \$26,500.00; by its terms no interest was due thereon or payable until after the note

had become due. If the time of payment of the note was extended from March to June 1920 by this alleged agreement of the parties, then the note did not become due until June; and no interest became due until June; and then only, if the note remained unpaid at that time; hence under the averments at the time the judgment was taken the defendants were not liable for any interest. Assuming, that the plaintiff under the power of attorney had a right to take a judgment by confession on May 20th, 1920, such judgment according to the terms of the note and the agreement referred to could legally be only for the amount of the principal of the note and ten per cent attorney's fees, which together would make a total sum of \$29,150.00; the judgment however is for \$29,382.50; thus showing an excess of at least \$232.50 over the amount the plaintiff could be legally entitled to recover. There is a clear inference therefore, from the affidavits of the defendants in the judgment, that they have a defense, to at least a part of the judgment. We are of opinion that the court should have allowed the motion to open up the judgment, and should have given the defendants leave to plead. The order of the court is therefore reversed, and the cause remanded with directions to sustain the motion of the defendants in error, to open up the judgment, and to grant them leave to plead in defense.

Reversed and remanded with directions.

General No. 7374

Agenda No. 23

October Term 1921

Fred Baber, Trustee, Appellee

vs.

Erastus Hurst, Appellant

Appeal from Edgar.

NIEHAUS, J.

On February 10, 1915 Charles Hoult, Laura J. Hoult, Everett Hoult, J. Warren Hoult, Annette Hoult and Lewis Hoult, entered into an agreement with their creditors, including the appellant, Erastus Hurst, by which they conveyed all their property real and personal, except 80 acres of land, to the appellee Fred Baber as trustee, for the benefit of their creditors. The agreement recites, that the debtors named, were indebted to sundry persons companies and corporations in large sums of money, amounting to about \$150,000.00; and that they owned about 714 acres of land in Edgar County; and about 560 acres of land in Bolivar county, Mississippi; and approximately about \$10,000.00 worth of personal property. That Everett Hoult, one of the debtors named, was possessed of real estate consisting of about 160 acres of land in Edgar county, and personal property of the value of about \$3000.00; and that, inasmuch as numerous creditors had taken judgments against the debtors named, and had brought judgment suits against them; and had executions issued thereon, which were then in the hands of the sheriff of Edgar county; and that the debtors being so indebted, and desiring to secure an equitable distribution of their assets among their creditors, to secure as large a return as possible from their assets, and to prevent a sacrifice thereof, agreed to transfer

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their property to the trustee. The agreement also provides that the trustee shall hold the property for the uses and purposes of the trust; except 80 acres of land occupied by the debtor Charles Hoult and his family as a homestead, and including all household goods, and the improvements on the land, which are exempted from the operations of the trusteeship; and it was further agreed by the debtors and the creditors, that certain indebted-

ness against the 80 acres so exempted, should also be assumed and paid by the trustee out of the monies or assets which would come into his hands as a part of the trust estate; and that Charles Hoult was to receive the 80 acres of land, free from all existing encumbrances thereon, except the general and special taxes that were then due, or would become due thereafter; that the 80 acres of land, which by the agreement, was released from the operation of the trust, should be released to Charles Hoult as his separate property. The agreement also provided, that in the event the trust estate, after deducting the 80 acres of land referred to, should be insufficient to pay the indebtedness held by the creditors, the trustee should apportion the fund among the creditors in proportion to the amount of their respective claims, regardless of any priority of liens then existing. It was also stipulated in the trust agreement, that all liens held by the creditors, except mortgage liens, made prior to December 1st, 1914, were to be assigned to said trustee; and the trustee was fully empowered to sell and convey portions or all of the trust estate, and make good and sufficient deeds of conveyance thereof, free of any kind all existing liens or claims of liens of any of the creditors.

The appellant Hurst's claim consisted of a judgment note made by Charles Hoult, Lewis J. Hoult, Everett Hoult and George W. Fair; the latter not a party to the trust agreement

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either as debtor or creditor. Following the execution of the trust agreement on March 22, 1915 the appellant took judgment by confession on the judgment note, for \$9210.67 in the circuit court of Edgar county against the parties named. The appellee as trustee, proceeded under the trust agreement to carry out the purposes thereof, by collecting the assets and converting the real estate into funds for distribution among the creditors, in accordance with the requirements of the trust; and made distribution of the funds in his hands from time to time among the creditors. On August 24, 1917, he paid the appellant two dividends of 20 percent each upon his claim; and on February 2, 1918 paid him another dividend of 20 percent. At the time

of the filing of the bill of complaint herein, the trustee was ready to pay another dividend of 20 percent; but refused the further payment of dividends, unless the appellant should assign his judgment to him as trustee, which the appellant refused to do. The appellee thereupon filed this bill in equity, alleging that the appellant was a party to the trust agreement, and had received 60 percent by virtue thereof; that under the terms of the trust agreement the 80 acres of land had been released to Charles Hoult one of the debtors; and had been retained by him under the terms of the trust agreement as exempted from claims of the creditors; but was legally charged with the lien of the judgment which the appellant had taken, contrary to the force and effect of said agreement; that under the terms of said agreement the appellee was entitled as trustee to an assignment of appellant's judgment; and was entitled to have said judgment released as to all parties except George Fair. The bill also prayed, that the appellant be compelled to assign his judgment to the appellee as trustee, and that he be compelled to execute a release of the same as to all parties except said

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George Fair, and to release any lien he might have acquired thereby on any of the lands involved in the trust agreement. The appellant filed an answer to the bill, in which he denied the right of the appellee to the relief prayed for.

On the hearing, the Court found, that the appellant's judgment was not an enforceable lien, except as to George W. Fair; and that the appellant as creditor upon receiving his distributive share of the debtor's estate, must take the same in full satisfaction of his claim against the debtors; and that the judgment should not be lien upon any of the property of Charles Hoult, Laura J. Hoult and Everett Hoult, and restraining the appellant from enforcing the same as to any property then owned or which thereafter might be owned by them; from this decree an appeal is prosecuted.

The rights of the parties concerning the matter in controversy must be determined by the terms of the trust agreement, by which the appellant and all parties to the same were legally bound. It is clear from the

terms of this agreement, that the appellant would have no right to enforce his judgment, or any lien arising therefrom, against the 80 acres of land retained by Charles Hoult and exempted to him; and the decree insofar as it exempted this land from the operation of the judgment was proper. But there is nothing in the trust agreement which provides, that the creditors are to take a partial payment of their claims in full satisfaction thereof; nor that they thereby relinquished any right which they legally have to enforce the payment of any balance that might be due them, against any after acquired property of the debtors. We are of opinion therefore, that the decree was erroneous insofar as it deprived the appellant of the right to enforce the collection of any balance that might remain due upon his judgment against

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any property thereafter acquired by the judgment debtors; and that part of the decree must therefore be reversed. The decree is affirmed insofar as it avoids the operation of a judgment lien against the 80 acres referred to; and reversed insofar as it prevents the appellant in obtaining satisfaction of any balance that may remain due on his judgment after his full share, in the trust agreement funds is credited thereon, out of any after acquired property of the judgment debtors; and with directions to reform the decree in accordance with the views herein expressed.

Affirmed in part and reversed in part with directions.

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General No. 7380

226 I.A. 330
Agenda No. 29

October Term 1921

James W. Coffman, Appellant

vs.

Eugene Colgan, Appellee

Appeal from Sangamon.

NIEHAUS, J.

This suit was commenced by the appellant, James W. Coffman, in the county court of Sangamon County, against the appellee Eugene Colgan, in assumpsit, to recover the sum of \$1000.00, which it is alleged by the appellant, was due him under an oral contract with the appellee, under the terms of which he was to find a coal mine property, that was suitable for the appellee's purpose; and which he could acquire by purchase. There was a trial by jury and after the evidence for the plaintiff was heard and concluded, on motion of the appellee, the court directed a verdict for the appellee, and judgment was rendered on the verdict. This appeal is prosecuted from the judgment.

The only contention involved in the appeal concerns the legal propriety of directing a verdict for the appellee, which necessarily raises the question, whether there was evidence adduced on behalf of the appellant which, with all reasonable inferences to be drawn therefrom, would have justified the jury in finding a verdict in favor of appellant's claim. The appellant J. W. Coffman, who was a witness in his own behalf testified, on the trial concerning the matter in controversy. He stated, that he was a real estate dealer; and that he had a conversation with the appellee concerning the matter of the commis-

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sion which he seeks to recover; that in this conversation appellee told him, that he was going to be out of his mine at Mt. Olive the first of January following, and wanted him to keep a still hunt for a coal mine. That the appellee said "I don't want anybody at all to know much about it; and I will take care of you if you find something. He said "find me the stuff, if you get it, and I will do the work, and will pay you for your trouble." That thereupon he looked for a mine for the

appellee in seven or eight places; that he found a party who owned a mine at Pekin; and that the party was David Grant. Grant told him he had a mine to sell; and told him what he wanted for it; that he went to Pekin to see about Grant's mine; and got Grant to write a letter giving the net price of it. This letter he turned over to the appellee. That the letter was to the effect that Grant would take \$40,000 net for the mine; that the appellant thereupon told him, he would call his engineer from Mt. Olive, and have him go and inspect the mine. He did call up the engineer, and told him to go there the next day; that the engineer looked the mine over, and spent a day there; and reported favorably; that after that, he and the appellant and his son Howard and their superintendent Smithousen, talked over the matter of purchasing the mine, and that they authorized him to telephone and call Mr. Grant and tell him they would accept the mine; that he went to a telephone, and called him up, and told him, they had accepted the property, and arranged with Grant to come to Springfield; and he came; that on the day he arrived, appellee had a conversation with the appellant and his son, after he had taken Grant over to the St. Nicholas Hotel; that this conversation was had at appellee's office, and that he first talked over the matter of the commission which he claimed he had earned, with his son Howard; that he wanted five percent, and Howard said,

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that it was too much; Howard thereupon called up the appellant, his father, to talk with him about the matter, and turned around and said, father said \$1000.00 is enough, and he is perfectly willing to pay you \$1000.00 for this proposition; that thereupon he went to the hotel, and got Grant, and brought him to the Colgan office, where a contract was made by the appellee for the purchase of the mine in question, and \$500.00 was paid to Grant on the purchase price of the mine.

We are of opinion that this testimony standing in the record as it does, uncontradicated, justifies the inference that the appellant had performed the service for which under his contract he was to render, and for which the appellee was to renumerate him, namely, to find a mine that suited him and which he could purchase; and

that the parties had in effect agreed upon the amount which the appellant was entitled to receive for his service, namely, \$1000.00. In this state of the proof, which made a prima facie case for appellant, it was erroneous to direct a verdict for the appellee. The judgment is therefore reversed and the cause remanded.

Reversed and Remanded.

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226 I.A. 330

General No. 7388

Agenda No. 35

October Term 1921

Cassandra B. Hartford, Appellant

vs.

Lester A. McMasters, Appellee

Appeal from County Court of Champaign

NIEHAUS, J.

This suit was brought by Cassandra B. Hartford, the appellant, to recover rent for the use and occupation of a garage situated on her property which had been occupied and used by the appellee Lester A. McMasters, for a period of 32 months, from Sept. 1, 1917 to April 30, 1920. The suit was commenced before a justice of the peace, and on appeal, was tried in the county court of Champaign county. The trial resulted in a verdict in favor of the appellee. The appellant made a motion to set aside the verdict and for new trial; but the court denied the motion and rendered judgment on the verdict. An appeal is now prosecuted from the judgment. The evidence shows, that the garage in question, is situated on a lot in Urbana, owned by the appellant, and known as 406 South Coler Avenue; and this lot adjoins the premises known as 610 West Elm street, owned by appellant's husband, Dr. William S. Hartford. There is no controversy in the case concerning the fact, that the appellee occupied, and used the garage in question for the period of time, for which rent is claimed; and the evidence is also undisputed, that the rental value for this use and occupation would be \$2.50 per month. The appellee, however, claims that he made a verbal contract with appellant's husband, Dr. Hartford, from whom he purchased the adjoining property referred to, who it is insisted

Page 1

acted as her agent, in that behalf; and that under the verbal contract he had the right to the use of the garage rent free, during the time in which the payments were being made under his written contract, for the purchase of the Elm Street property, and until the completion of such payments thereon. The verbal agreement insisted on, it is contended was made just previous to the signing of the written contract for the purchase of the Elm street property from Dr. Hartford.

This verbal agreement as set forth in the testimony of the appellee, is based on a conversation had between the appellee and Dr. Hartford, and is as follows: "I says, I have no garage. There is none on my property, I am buying from you. I have turned everything I have in cash and collateral to you, and I can't afford to build a garage and neither can I afford to rent one. He says, 'You make use of that garage. Its a double garage, keep on using it as the man who is living in that house today is using it.' Under that, I used that garage." Assuming that Dr. Hartford used the language testified to, it is apparent that it does not sustain appellees contention; and that it does not exempt the appellee from the payment of rent, for the use of the garage; but that it has directed reference only to the use of the garage by the appellee. The law does not raise any presumption, that a use like the one in question should be without compensation therefor to the owner, unless this was expressly agreed upon; or, unless such an agreement would clearly arise, by reasonable inference from the language used. And it must also be pointed out, that if this alleged verbal agreement amounted to a right to the use of the garage in question on appellant's premises, rent free for 32 months, there would be no consideration to the appellant, the owner of the premises, for such an agreement. In this condition of the record, the agreement was not a legal defense to the appellant's claim for the rental value of the garage.

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The verdict of the jury was therefore contrary to the law and the evidence; and the court erred in refusing to set it aside and grant a new trial; and the judgment is therefore reversed and the cause remanded.

Reversed and remanded.

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General No. 7395

226 I.A. 330
Agenda No. 41

October Term 1921

Henry Horner & Co., Appellee

vs.

Gaetano Passini Appellant

Appeal from Christian.

NIEHAUS, J.

Filed April 22-1922

In this case an appeal is prosecuted from a judgment for \$1126.21 against Gaetano, Passini, appellant, in the circuit court of Christian County. The case was tried without a jury and by the court. The claim of the appellee is based upon a written order purporting to have been signed by Passini for a carload of Black California Grapes. The order was taken by one of appellee's salesman, named Falco; and returned by Falco to the business house of appellee at Chicago. According to the written order turned in by Falco, the grapes were to be shipped to the appellant C. O. D. to Kincaid, Illinois; and were shipped in that way. When the carload of grapes arrived at Kincaid, the appellant refused to receive them under the C. O. D. conditions which required payment therefor before he could get them, claiming, that he did not purchase them in that way. The vital question in the case, is whether the written order handed in by Falco had the signature of the appellant upon it; and this question was one of unusual difficulty, because Falco was not a witness in the case; and because whatever signature had been attached to the written order, had been erased from the order, while it was in the custody and possession of the appellee, without any explanation as to the cause or reason for its erasure. The only witness to testify concerning the signature of the appellant was George A. Carpenter, who was the buying and department manager of the appellee. He testified, that the

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order contained the appellant's signature, when it was first turned in to the house. But it is clear from Carpenter's testimony, that he had no personal knowledge concerning the writing of the appellant; he had never seen him write, and had never seen any papers containing his signature, which he personally knew was

actually written by Passini. As to his knowledge about this matter, he testified: "I know the signature of Gaetano Passini from seeing it. I have a correspondence with him, just two or three letters he signed, and from that correspondence I am familiar with his signature." Passini denied, that he had signed the order, which Falco had turned in; in the face of this denial by Passini, the proof mentioned cannot be regarded as sufficient to establish the genuineness of Passini's signature, if there was one on the order. And the trial court held, that the written order had not been signed by the appellant. The court also found, that the contract, which was made between the appellant and the appellee was an oral contract. The evidence, and only evidence, concerning an oral contract, is in the testimony of the appellant. Appellant testified with reference to this matter as follows: "Well Falco was there, and tried to sell me a carload of grapes. He said, he would send me in three shipments, and said, when you sell the first shipment, you send me the money, and I send you the second shipment; and when you sell the second shipment, I will send you the third one, and you send money. I never ordered any grapes from Mr. Falco, where I had to pay for the grapes at the time I received them at Kincaid, and take up the Bill of Lading. I used to buy from him before that. At the time when Mr. Falco was there, I did not order the grapes shipped so I would have to pay for them when they came." In this state of the proof in the record, there is no evidence that the appellant violated

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his contract, by refusing to receive the grapes under the conditions of the C. O. D. which the appellee was insisting on, and seeking to enforce. The judgment is therefore erroneous; and it is reversed; and the cause remanded.

Reversed and Remanded.

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General No. 7412

226 I.A. 380
Agenda No. 68

October Term 1921

First National Bank of Morrisonville, Ill., Appellee

vs.

Mary A. May, Appellant

Appeal from Christian.

NIEHAUS. J.

In this case the First National Bank of Morrisonville, Illinois, appellee, took judgment on the 11th day of May, 1921, in the circuit court of Christian county on a judgment note, made by D. H. May, and the appellant Mary A. May, for \$2744.26. Thereafter on the 17th day of May following, the appellant as one of the makers of the note in question filed her motion in the circuit court of Christian county to set aside, or open up the judgment, and for leave to plead in defense; which motion was supported by her own affidavit, and by the affidavit of Anthony May, her husband, who had acted as her agent in some matters connected with the execution of the note. The averments in the affidavit of appellant are to the effect, that the judgment note in question was executed as a note for \$600.00; that when she signed the note as maker, the words Six Hundred Dollars were in the note, and that the word Hundred was changed to Thousand so as to read Six Thousand Dollars; that after she signed the note, she gave it to her husband Anthony May who, acting as her agent, delivered the same to the appellee; and that the note was altered after its delivery without her knowledge permission consent or authority. The affidavits presented a prima facie case of material alteration of the note; Keller v. State Bank of Rock Island 292 Ill. 553.

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The motion to open up the judgment should therefore have been allowed, and the appellant given leave to plead in defense. The order of the court denying the motion is therefore reversed, and the cause remanded with directions to sustain the motion.

Reversed and remanded with directions.

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General No. 7413

2201A. 330
Agenda No. 53

October Term 1921

George Smith, Appellee

vs.

Angelo Giovanni, Appellant

Appeal from Macoupin.

NIEHAUS, J.

In this case George Smith the appellee sued the appellant Angelo Giovanni in the circuit court of Macoupin county in trespass. The declaration contains three counts and charges in substance that the plaintiff owned certain household furniture and chattel property which was in a dwelling house occupied by him; and that the defendant forcibly entered the dwelling house and damaged his household furniture and chattels. There was a trial by jury, which resulted in a verdict finding the defendant guilty and assessing appellee's damages at \$350.00. The court required a remittitur of \$100.00 which was entered, and thereupon rendered a judgment against the appellant for \$250.00. An appeal is prosecuted from the judgment.

The only question argued concerns the matter of the damages; appellant contends, that the damages allowed are excessive; and that under the evidence the appellee was not entitled to more than nominal damages; and therefore, that it is apparent from the amount of the verdict, that punitive damages were allowed. We cannot agree with this contention. The evidence in the record fully sustains a finding of actual damages suffered by the appellee to the amount embodied in the judgment; and the court was fully warranted from the evidence in rendering judgment therefor. Judgment is affirmed.

Affirmed.

General No. 7420

Agenda No. 59

October Term 1921

R. W. Hilmer, Appellant

vs.

Bruce Sewing Machine Company, Appellee

Appeal from Sangamon

NIEHAUS, J.

This is a suit in replevin brought by the appellant R. W. Hilmer, to recover a piano of which he was the owner, and which had been taken by the appellee, Bruce Sewing Machine Company, from Concordia College, where it had been placed by the appellant under contract, for the use of students in that institution. The appellee claimed it took the piano from the college, under misapprehension or mistake, thinking it was one of its own pianos. The case was tried in the county court of Sangamon county without a jury; and the court found the issues for the appellee, and rendered judgment against the appellant for costs of suit; also for \$25.00 attorney fees. An appeal is prosecuted from the judgment.

It is claimed by the appellee, that the taking of the piano was not wrongful, because it took it under a mistake. The taking of the property of another by a person though by mistake would be a wrongful taking; the mistake might be a moral excuse for the taking, but would not legalize the taking; and moreover would not be a justification for a wrongful detention of the property from the rightful owner after the mistake was discovered; nor would it be a legal defense to a recovery by such owner, of his property. Inasmuch as no motion for new trial is incorporated in the Bill of Exceptions, the appel-

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lant is not in position to raise any question concerning the weight or sufficiency of the evidence and we must assume that the findings of the court are sustained by the evidence. But the findings of the court, assuming them to have been sustained by the evidence, are inconsistent with the judgment rendered. The Court found that the appellant was the owner of the piano in question; also found that the appellant was entitled to

the possession of the piano; and that the defendant never had any right to the possession of the same. Under these findings the appellant and not the appellee was entitled to judgment. The record does not disclose any legal basis for the assessment of costs and an attorney fee against the appellant. Judgment is therefore reversed and the cause remanded, with directions to render judgment in favor of the appellant.

Reversed and remanded with direction.

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Gen. No. 7312.

Attenda No. 38.

April Term, 1901. 226 I.A. 631

Roland R. Stafford and
Ward C. Broehl, partners, etc.,

Appellees,

vs.

W. V. Wills,

Appellant,

Appeal from the Circuit
Court of Logan County.

Graves, P. J.

Appellant was the owner of 608.84 acres of land in Pike County, Illinois. Appellees were real estate brokers. The evidence in the record fairly tends to show that appellant placed the land in question in the hands of appellees to sell and that it was agreed between the parties that in case the lands were sold by appellees they were to have for their commission all the same brought over \$150 per acre. It further tends to show that they interested one Jacob Lauer in the land which they offered to sell to him at \$300 per acre. While the evidence fails to establish that appellees made a sale of the premises to Lauer for \$300 per acre, or any other amount, or that he was ready, willing and able to buy the same for \$300 per acre, it does conclusively show that he in fact purchased the same of appellant through the activities of his brother Emmet S. Wills and one C. T. Laird for \$195 per acre. This

which they now claim is their due as commissions earned by them in this transaction. The case was tried by the court, a jury being waived. The court found the issues for the appellees and assessed their damages at \$30400, and entered judgment for them and against appellant for that amount and for costs.

Appellees do not argue that they sold the land to lauer, nor that they made a binding contract with him to purchase it, but they insist that as they procured a purchaser who did close the deal with appellant on terms that were satisfactory to him they have earned their commissions and that therefore the judgment should be affirmed. That they are entitled to the agreed commissions on the transaction if as the court found, as it did that the sale was made by appellant to a customer who was procured by appellees, is conclusively settled by the holdings of the Supreme Court in Rafnar v. Harrison, 100 Ill. 212 and in Ridgen v. More, 236 Ill. 363.

The contract established by the evidence produced by appellees in this case and which the trial court found to be true was that appellees were to have as their commissions all for the land was sold/over \$160 per acre. The evidence intro-



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duced by them also shows that the land was sold for \$150 per acre. The earned commissions are thereby conclusively fixed at \$45 per acre or \$27397.80 that sum being the excess over \$150 per acre for which the land was sold. The trial court computed the damages at \$50 per acre or \$30400. That was error. There is no evidence whatever on which to base a finding that the commissions earned exceeded \$45 per acre.

The judgment of the circuit court is therefore reversed and judgment is entered in this court in favor of appellees and against appellant for \$27397.80 and for all costs of suit; but that the costs of the appeal be assessed against the appellees.

2261.A. 681

No. 7332.

Agenda No. 13.

October term, 1981.

J. G. Chambers,

Plaintiff in Error,

vs.

Error to Circuit Court

of Douglas County.

A. T. Thompson, et al., Com-
missioners, etca,

Defendant in Error,

Graves, P. J.

J. G. Chambers presented a petition for mandamus to the Circuit Court of Douglas County to compel the commissioners of Drainage District No. 1 of the Town of Arcola to repair, rebuild and maintain a bridge over the main ditch in said district which passed through the land of the petitioner. Judgment by default was entered against the defendants, which was upon motion of the defendants set aside and an answer and replication filed.

The cause was heard by the court and the issue found in favor of the drainage commissioners, and an order entered denying the right of Chambers in the premises and ordering him to pay the costs. From this order Chambers sued out a writ of error from this court.

It is first contended that the trial court erred in setting aside the default and allowing the commissioners to answer and make^a defense. The petition for mandamus was filed to the October Term, 1918, of the said circuit court and the commissioners served with process. A demurrer to the petition was filed but no action by the court was had at that term of court. At the next term, being the March Term, 1919, affidavits that none of the defendants was under disability were filed by the petitioner and about that time it would seem that the attorneys representing the respondents and who had filed the demurrer to the petition for the respondents ended their connection with the case and other counsel were employed. At said March Term, 1919, a default was entered against the commissioners and a peremptory writ of mandamus awarded.

The action of the court in setting aside the default and allowing a hearing upon the merits of the case is now challenged by plaintiff in error as "constituting an abuse of discretion by the court." This claim, in our judgment, is without merit. Suit was begun at the October Term, 1918, service had and a demurrer filed by the defendants, which was left undisposed of during that term; an amended petition was



filed on December 9th, 1918, on which no action seems to have been had until the following term; at the following term, March 1919, the court entered a default against the defendants named in the petition and ordered a peremptory writ of mandamus. On March 29th, still of the said March term, 1919, defendants appeared by their present attorneys and presented a motion to have the default set aside and for leave to answer the petition which motion was supported by affidavits setting up a substantial defense. Under the circumstances involved we do not think that any good can result from discussing at length the right of the court to set aside the default entered and allowing a full defense to be made; Under Sec. 58 of our Practice Act and the holdings of our courts of review under it, such action is wholly within the discretion of the trial court and courts of review can interfere only when such discretion has been abused. Under the showing made here, the petitioner was subjected to no material delay and no substantial right he had was impaired by the court's setting the default aside. We do not think there is anything shown in this record to warrant ^{this} ~~the~~ court in saying that the trial court abused its discretion; in fact it would seem that the action of the trial court in this respect was eminently fair and proper.

Upon the hearing of the claim of the petitioners to have a bridge across the ditch upon his premises built and maintained by the drainage commissioners, the claim was made upon the part of the commissioners that when the ditch was dug across the premises of petitioner in the year of 1800 the lands through which the ditch passed, and now involved, were owned by one C. C. Wood, a remote grantor of plaintiff in error, and that said Wood agreed with the then acting drainage commissioners that he would not ask for a bridge across the ditch to be built at the expense of the district, if his lands in the district should be classified at zero; that in that event he would not be assessed to pay any tax in said district and in turn he would not ask the commissioners to construct a bridge on these lands; that the commissioners in pursuance of said arrangement had never extended any tax upon the lands involved and that no bridge was ever built or maintained by the commissioners upon said lands.

The drainage commissioners also claimed upon the trial that even if the plaintiff in error ever had any right to demand a bridge, his right to do so was barred by the statute of limitations. This was the view, seemingly, adopted by the trial

court. The commissioners filed an answer setting up the statute of limitations to which plaintiff in error filed a replication; thus an issue of fact was made for the trial court to hear and determine. Considerable evidence was heard upon this subject which was conflicting in nature, which the trial court was called upon to weigh. This issue of fact the trial court determined in favor of the defendants in error and in our judgment there was no error in such holding.

In a proceeding by mandamus the petitioner is bound to establish his right by such evidence as will make a clear case. A relator cannot demand a writ of mandamus as a writ of right. The granting of the writ is discretionary with the court in view of all^{the}/existing facts and with due regard to the consequences which will result. People v. City of R. I., 215 Ill. 488.

There is no sufficient showing made in this case to warrant this court in determining that the trial court was in error in holding that the relator had not established his case by such evidence as made a clear case. The judgment of the circuit court is affirmed.

Judgment affirmed.

Gen. No. 7368.

Agenda No. 17.

October Term, 1921.

Ira F. Twist, et al.,

Defendant in Error,

vs.

James C. Davis, Director General of Railroads, etc.,

Plaintiff in Error,

226 I.A. 631

Error to County Court

of Sangamon County.

Graves, P. J.

Ira F. Twist, et al., under the firm name of Twist Brothers, brought suit in the circuit court of Sangamon County against James C. Davis, as Director General of Railroads, etc., to recover for damages alleged to have been sustained by defendants in error through the negligent delay by plaintiff in error in the transportation of corn from East St. Louis, Illinois, to Peoria, Illinois. A trial was had before a jury and verdict returned in favor of the plaintiffs in the suit for the sum of \$903.35, upon which, after overruling a motion for a new trial, judgment was rendered. The matter is

Gen. No. 7368.

Agenda No. 17.

October Term, 1931.

Ira F. Twist, et al.,

Defendant in Error,

vs.

James C. Davis, Director General of Railroads, etc.,

Plaintiff in Error,

2261.A. 331

Error to County Court

of Sangamon, County.

Graves, P. J.

Ira F. Twist, et al., under the firm name of Twist Brothers, brought suit in the circuit court of Sangamon County against James C. Davis, as Director General of Railroads, etc., to recover for damages alleged to have been sustained by defendants in error through the negligent delay by plaintiff in error in the transportation of corn from East St. Louis, Illinois, to Peoria, Illinois. A trial was had before a jury and verdict returned in favor of the plaintiffs in the suit for the sum of \$903.35, upon which, after overruling a motion for a new trial, judgment was rendered. The matter is in this court upon a writ of error sued out by Davis as Director, etc.

The suit was brought to recover loss by damage to corn said to have arisen on two different shipments, which were set up in two different counts in the declaration. Under the first count it was made to appear upon the trial that notice of

claim was not given within four months after the arrival of the car of corn involved at Peoria, as required by the bill of lading, and as to that count no recovery was had. The jury by its verdict found in favor of the Twist Brothers upon the second count alone, which count had to do with one car, No. 45950.

Plaintiff in error first contends that there is no evidence of the condition of the corn at the time when it was delivered to the railroad company for shipment. Upon or before the trial in the court below, a stipulation was entered into between the parties by force of which the grade of corn at the place of shipment could be shown by the inspection certificate at place of shipment. In pursuance of this agreement the inspection certificate was admitted in evidence and showed that the corn shipped in the car No. 45950 was, at the time of its receipt for shipment April 17, 1918, "in apparent good order." In corroborative testimony was given to the effect that the corn when delivered to the carrier was cool with no sign of heating. Under this evidence the jury was warranted in finding the corn when received by the carrier was in good condition, and would be in the same condition when received in Peoria, if

transported within a reasonable time.

Plaintiff in error next contends that a carrier is not an insurer of prompt delivery of property received by it for shipment. That, may be conceded to be the law, and yet the carrier would be held to make delivery within a reasonable time after receipt of property for shipment under all the circumstances surrounding the case. That this is the law seems to have been recognized by the plaintiff in error in his second instruction tendered and given by the court, which in effect was that a carrier must deliver a shipment within a reasonable time under ^{the} all circumstances. If the time in transit seems to be reasonable, the burden is then upon the carrier to show that reasonable effort has been made upon its part to transport the goods within a reasonable time, having consideration of all the surrounding circumstances.

In the case at bar the evidence showed that the car of corn in question was inspected on the 17th of April, 1918, at East St. Louis and consigned to Peoria, and there was evidence tending to show that such car was received in Peoria on or about the 8th of May following; that is, a period of nine-

teen days seems to have elapsed between the date the corn was received for shipment at East St. Louis and its delivery to the consignee at Peoria. There was also testimony in the case showing that the usual time required for such shipment at about the time of the shipment involved was from two to three days. Under the circumstances in evidence it was fairly a question of fact for the jury to say whether or not the time taken in shipment was or was not a reasonable time for the transport of the car of corn from East St. Louis to Peoria. Plaintiff in error made no attempt to show any unusual conditions surrounding this shipment, which would explain or excuse the delay from which it is claimed damages resulted to tenants in error. In our judgment the jury was fully warranted in finding that there was unusual delay in the transport of car No. 45950.

Plaintiff in error next argues that there is not sufficient showing made as to date or time of delivery of car No. 45950 at Peoria; that is that the evidence fails to show the time when the car in question did arrive in Peoria, and that no presumption can be indulged on this score and therefore the case must fail for want of evidence. On the subject of presump-

tion or want of presumption plaintiff in error cites several authorities. We have considered those cases and are of the opinion that none of them support the contention here made.

In one of those cases, Kearns v. The People, 224 Ill. 170, the holding was merely to the effect that the birth of a child born to the prosecutrix about six months after an alleged rape does not raise any presumption as to the guilt of the party accused.

In another case cited, Globe Accident Insurance Company v. Gerisch, 163 Ill. 696, the holding relates to the manner in which a man came to his death upon a claim for Life Insurance where there was no direct proof of the cause of death. The Supreme Court there say, "A prima facie case of accidental death from a strain received by the deceased in lifting a box of ashes is not made out by evidence showing that the deceased probably died from the effect of a strain, where the fact of having lifting the box of ashes is not proved directly but merely presumed from the circumstances."

The last case just referred to is as strong as any authority cited on this subject and seems to us to fall far short of supporting the claim made by plaintiff in error. In

that case the defendant insurance company was confronted by a presumption merely and liability was asserted solely upon the presumption that the deceased had been strained in lifting ashes merely because a part of his labor consisted in doing that work. Furthermore, in the case at bar the plaintiff in error knew or should have known when the car in dispute was in fact delivered at Peoria and being in possession of such evidence is not in a position to say that a reasonable presumption is not to be given force when the power is in its hands to overcome the presumption if it be wrong.

The evidence in the case fairly shows that defendants in error suffered substantial damages and that such damages resulted from delay in shipment by plaintiff in error in no way explained. The judgment is right and is affirmed.

Judgment affirmed.

Filed alone June 9, 1922.

100 - 87608

JOSEPH SCHLITS BREWING COMPANY,
a Corporation,

Appellant,

vs.

CHICAGO RAILWAY COMPANY, et al.,
Appellees.

226 I.A. 681

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ST. LOUIS, MO.

PER ORIAM.

This is an appeal from a judgment in favor of appellees, defendants below, in an action by appellant, plaintiff below, to recover the amount of compensation payable by plaintiff to one of its employes for an injury arising out of and in the course of his employment, but which it is claimed was caused by the sole negligence of defendants. In other words, this was an action by an employer against a third party on the liability provided for by the first branch of section 39 of the Workmen's Compensation act. The injury to the employe was suffered August 31, 1917, and this suit was brought August 24, 1920. Defendants pleaded not guilty and the two-year statute of limitations. Plaintiff's demurrer to the special plea was overruled, and thereupon judgment was entered for the defendants.

The sole question presented by the appeal is whether this action is governed by a limitation of two years or by a limitation of five years. If this kind of an action is governed by the two-year limitation, the judgment of the trial court was necessarily a proper one. Appellant contends that the limitation applicable is that of five years. Appellant's theory is that the liability created by the first branch of section 39 is not a liability for injuries to the person, but is on a new and distinct cause of action consisting of a right in the employer to recoup his own personal losses. The

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FIG. 1

This is a drawing of a mechanical part, showing a cross-section of a shaft with a flange or collar at the top. The drawing is labeled with various dimensions and part names, though they are difficult to read due to the image quality. The overall shape suggests a component from a machine, possibly a pump or a motor.

The drawing is a technical illustration of a mechanical part, showing a cross-section of a shaft with a flange or collar at the top. The drawing is labeled with various dimensions and part names, though they are difficult to read due to the image quality. The overall shape suggests a component from a machine, possibly a pump or a motor.

United States Circuit Court of Appeals for this circuit, in Stark Brewing Co. v. C. C. C. & St. L. Ry. Co., 270 So. 237, 1922, by a divided court, sustained the view of appellant. See also Richardson Ready Roofing Company v. Chicago & Eastern Indiana R.R. Co. (No. 28703, Ill. App., opinion filed Oct. 3, 1921, not yet reported.) Appellees contend that the right of action is simply the employee's cause of action transferred to the employer, with no other conditions to its enforcement than the requirement of freedom from contributory negligence on the part of the employer and a limitation on the amount of the recovery, and that, so construed, the action is one for injury to the person. This was the view of the law taken by this court in Harrison Furniture Co. v. C. E. Ry. Co. et al., (310 Ill. App. 647.) This is the view which was taken of the question by Judge Alschuler in his dissenting opinion in the Stark Brewing Co. case supra. We consider this analysis of the right of action by an employer under the first branch of section 39 as fully supported by the recent decision of the Supreme Court in Taylorville v. Central Illinois Public Service Co., 301 Ill. 157. Inasmuch as we regard this as a suit to enforce a cause of action to recover for injury to the person, the action must be brought within two years from the date of the injury, regardless of the form of the action. (Haminski v. C. & E. Ry. Co., 274 Ill. 232.)

We therefore hold that the trial court did not err in overruling plaintiff's demurrer to defendant's plea of the two-year limitation.

The judgment is affirmed.

AFFIRMED.

Filed alone June 9, 1922.

359 - 26435.

BELL & HOWELL COMPANY, a corp.,

Appellant,

v.

GEORGE K. SPOOR,

Appellee.

226 I.A. 332

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The cause was consolidated with Bell and Howell Company v. Spoor, General Number 26435, for hearing. We have announced our opinion in General Number 26435, and therein set forth the facts and the law which in our judgment was applicable.

The trial judge, in the instant case, found that the plaintiff was entitled to recover royalties up to October 15, 1917, the date of the alleged assignment, amounting to \$6410.67 and interest and entered judgment therefor. That was done apparently on the theory that the contract of May 1, 1915, was binding, but only up to October 15, 1917. For the reasons, however, which we have set forth in our opinion in Bell and Howell v. Spoor, General Number 26435, the trial judge erred, and the above mentioned judgment must be modified. Judgement will be entered here, in the instant case, in favor of Bell and Howell Company and against Spoor, for the three installments of royalties, due October 31, 1917, January 31, and April 30, 1918, being \$21,000.00 plus interest at five

Filed alone June 9, 1932.

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per cent on the three installments of \$7,000.00 each, from their respective due dates, namely, October 31, 1917, January 31, 1918, and April 30, 1918, to date, making in all, \$25,579.17, together with costs.

JUDGMENT MODIFIED and JUDGMENT HERE.

O'CONNOR, P.J. and THOMSON, J.
Concur.

CARL M. JOHNSON,

Appellee,

vs.

KEYSTONE OIL & MANUFACTURING
COMPANY, a Corporation, et al.
On Appeal of JAMES D. HAWKES,
Appellant.

226 I.A. 632

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

MR. JUSTICE JUSTICE MEYER

DELIVERED THE OPINION OF THE COURT.

September 4, 1918, Carl M. Johnson, plaintiff, a crossing policeman in the employ of the City of Chicago, while in the performance of his duty as such at the corner of Crawford and Milwaukee avenues, Chicago, was run into by an automobile driven by Anna L. Hawkes. The automobile in question was owned by the Keystone Oil & Manufacturing Company which had delivered it to James D. Hawkes, husband of Anna L. Hawkes, to be used by him in the prosecution of the company's business. Suit was brought by plaintiff in the Circuit court of Cook County, for damages for injuries sustained by him in the accident, against the Keystone Oil & Manufacturing Company, James D. Hawkes and Anna L. Hawkes. On trial the Keystone Oil & Manufacturing Company was dismissed out of the case and a judgment was entered, on a verdict of the jury which tried the case, against James D. Hawkes and Anna L. Hawkes for the sum of \$3,000. James D. Hawkes, individually, has brought the suit to this court for review.

The only point made in the brief filed by appellant is that James D. Hawkes cannot be held legally liable for a tort committed by his wife, and in support of this contention it is urged that the evidence introduced on the trial shows that Mrs. Hawkes on the day the accident occurred had used and operated the automobile without the knowledge, consent or authority of her

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husband; that she was not in any sense his agent or servant at the time the accident occurred.

We have examined the evidence and it is our opinion that it fails to show that James D. Hawkes had authorized or consented to the use of the car by his wife on the day of the accident, or that he had any knowledge of the fact that she had used it. Both Mr. and Mrs. Hawkes testified that Mrs. Hawkes had taken the car from the garage after her husband had warned her that she was not to use it.

Some testimony of neighbors living near the Hawkes family was introduced which tended to show that Mrs. Hawkes had driven the car in the presence of her husband, but however this may be, the above undisputed evidence in the record shows that on the day of the accident Mrs. Hawkes, accompanied by her sister, Miss Noye, had gone in the car to a real estate office for the purpose of transacting business in connection with a proposed purchase of a cottage by Miss Noye. Even if it be conceded that the evidence does tend to show that Mrs. Hawkes had driven the automobile at other times with the permission and in the presence of her husband, this fact would not create a liability against him, as the evidence shows that on the day in question Mrs. Hawkes was not using the automobile in connection with any business of her husband. The most that can be said is that she was operating the car for her own pleasure or in the furtherance of her sister's business.

Counsel for plaintiff admit that a wife is solely responsible for her own torts done in the prosecution of her own business or pleasure, and that a husband cannot be held for his wife's torts unless they are committed at his direction or as his agent on his business. Accepting this as a correct statement of the law, we think the judgment in favor of plaintiff must be re-

versed and the cause remained, as there is no evidence in the record which tends to prove that Mrs. Hawkes was operating the automobile at her husband's direction or as his agent on his business. Mere suspicion, if we had such, that Mr. and Mrs. Hawkes had not testified truthfully concerning the authority to use the car on the day in question would not be sufficient to overcome the positive proof that Mrs. Hawkes was without her husband's authority to use the car on the day of the accident. But even if she had his mere permission or authority, that fact would not be sufficient to render him liable for her negligence in operating the car.

In the case of Arkin v. Page, 287 Ill. 430, the Supreme court held that:

"A parent is not liable for the tort of his minor child merely from the relationship. There is no evidence or claim that George J. Page was not a competent chauffeur. An automobile is not so dangerous an agency as to make the owner liable for injuries caused by it to travelers on the highway, regardless of the agency of the driver. (Donfarth v. Fisher, 78 N. B. 111; Staffen v. McKaughan, 148 Wis. 40; James v. Hays, 47 Wash. 663.) The owner of an automobile who rarely permits another to use it for his own purposes is not liable for the negligence of the borrower in the use of the machine. (Hartley v. Miller, 145 Mich. 115.) The owner of an automobile is not liable for an injury occasioned by the negligent use of the machine by his servant if the servant was at the time at liberty from service of his master and not engaged in doing his master's business but was pursuing his own interest exclusively. Helly v. Lounable, 214 N. B. 526; Slater v. Advance Thresher Co., 87 Minn. 305."

And so it may be held here that the owner of an automobile is not responsible for the negligent use of the machine by his wife, if the latter is not at the time of the occurrence performing some service for her husband or engaged about his business.

In the case of Graham v. Page, 300 Ill., 40, the driver of the car was the owner's daughter, and the Supreme Court held upon the facts of that case that

"she was performing the business and duty of her father in the manner and with the means authorized by him. She was, if not the servant, at least the agent of her father in the performance of the duty of business. Liability does not, of course, rest on the mere relationship of parent and child. Cases may arise, and have arisen, where the facts proven created the relationship of master

and servant between the owner of an automobile and a son employed to drive it for his father, but we think the facts in this case created the relation of agency of the driver to the owner of the automobile. Some, or at least one, of the courts holding there can be no liability of the owner of the car in such a case have not strictly adhered to that view."

We think it may be said that the weight of authority is to the effect that the owner of an automobile may permit his servant, child, or wife to use and operate the vehicle without incurring any liability for the negligent operation thereof if it is made to appear that the car was not being used in furtherance of or in connection with any business of its owner. Atkin v. Page, 227 Ill. 420; Graham v. Page, 300 Ill. 40.

The judgment of the Circuit court will be reversed and the cause remanded to that court.

REVERSED AND REMANDED.

McSurely and Ketchett, JJ., concur.

121 - 26779

WEST TOWN STATE BANK,
a Corporation,

Appellant,

vs.

LOUIS S. GOLDBERG,

Appellee.

226 I.A. 632

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

In a declaration filed in the Superior court of Cook County the plaintiff charged that the defendant drew his check on the West Town State Bank of Chicago for the sum of \$2,500, payable to the order of Charles Jacobs; that Jacobs endorsed and delivered the check to plaintiff, a banking corporation, and that the West Town State Bank refused payment thereon when the check was presented to it for payment.

The defense set up was that Charles Jacobs offered to and did sell to defendant fifty cases of whiskey for the sum of \$2,500 to be delivered on the day of the purchase; that Jacobs represented to defendant that he was the owner of and had the whiskey in his possession; that at this time Jacobs did not intend to deliver the whiskey to defendant, but that his purpose was to defraud defendant by obtaining from him the check for \$2,500; that defendant never received the whiskey contracted for, and that the plaintiff had not received the check in good faith for value, and that it had notice of the fraud perpetrated upon defendant. The case was tried before a jury which returned a verdict in favor of the defendant. Judgment was entered on the verdict and plaintiff appeals.

On the trial one Joseph Stein, manager of a saloon conducted by defendant, testified that he had called up plaintiff's

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bank about three o'clock on the afternoon of the day the check was given to Jacobs and talked with plaintiff's paying teller; that he directed him not to pay the check if presented by Jacobs. Jacobs had formerly kept an account at the bank. The paying teller's testimony was to the effect that Stein had talked to him on the 'phone and that he, the witness, had informed Stein that the check had already been paid. The paying teller also testified that he had paid the check when it was presented at the bank and that at that time he had no notice whatsoever that it had been procured as alleged by defendant. While there seems to be a dispute in the evidence as to whether the check had actually been paid by plaintiff at the time of the telephone conversation between Stein and the teller, we think that the evidence does not sufficiently support the claim made by defendant that the check was cashed by plaintiff after knowledge had been given to it of the alleged fraud imposed on defendant. The check was presented by Mr. Siggeman, who had many times transacted business at the bank in the company of Jacobs.

No appearance or brief has been filed in this court on behalf of defendant. As the case is to go back to the trial court for a new trial, we do not express any opinion upon the weight of the evidence, except to say that it is our opinion that on the evidence the judgment in favor of the defendant should not be permitted to stand.

The judgment of the Superior court will therefore be reversed and the cause remanded to that court.

REVEREND AND HERMANDEE.

McBurely and Hatchett, JJ., concur.

203 - 25063

ENNIS-BAYARD PETROLEUM CO.,
a Corporation,
Appellant,

vs.

M. A. MAGGNER and FRED H.
YALEY, Copartners Doing Business as
CRYSTAL WAX COMPANY,
Appellees.

226 I.A. 682

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

HON. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in the Municipal court to recover the sum of \$300.53 alleged to have been due it by defendants upon an alleged promise of defendants to make to plaintiff an allowance of 5/8 cent a pound on 39,235 pounds of wax sold and delivered to plaintiff by defendants.

Defendants filed an affidavit of merits to plaintiff's claim, in which they denied the making of the allowance to plaintiff as alleged in the statement of claim. Defendants further set up that they had offered to make the allowance only on the condition that plaintiff would purchase and accept a third car of wax, which it was alleged plaintiff had contracted for at the time it purchased the wax above referred to, which consisted of two car-loads; that plaintiff refused this offer and it was thereafter withdrawn. Defendants also filed a set-off to the claim, in which they charged that by reason of plaintiff's failure to accept the third car of wax as contracted for at a price of 10 1/2¢ a pound, they "were obliged to go into the open market and sell said wax for the account of plaintiff" at a loss to defendants of \$929.53.

On a hearing before the court without a jury the court found the issues against the defendants on plaintiff's statement of claim, and assessed plaintiff's damages at the sum of \$300.53,

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and it further found the issues against plaintiff on defendant's set-off, and assessed defendants' damages at the sum of \$635. Judgment was therefore rendered in favor of the defendants for the sum of \$155.47. The plaintiff brings the case to this court by appeal. No appeal was taken on behalf of the defendants. We have before us, therefore, only the question of the legal propriety of the findings of the trial court in favor of the defendants on its set-off and on this question the evidence is conflicting.

September 9, 1918, the plaintiff ordered three earloads of wax from defendants to be delivered one car during each of the months of October, November and December, 1918, at a price of 10¢ a pound. September 14, 1918, defendants by letter accepted the order for the three earloads of wax, but it indicated therein its wish that plaintiff would accept the first car as soon as possible; the other two cars to go forward in November and December as per your instructions. Therefore, let us have your shipping instructions on first car as soon as your customer will accept." The first two earloads contracted for were duly delivered to plaintiff, and the controversy which gave rise to the litigation concerns only the third car contracted for.

The evidence tends to show that with reference to all three cars the parties agreed that they were to be held by defendants until the plaintiff had indicated its readiness to accept them. There is proof that the first two cars were not delivered until the first of the year 1919, although defendants' evidence shows that they were ready to deliver them during the months of September and October, 1918, and that defendants during the month of December, 1918, had more than enough of the material on hand to supply the third earload, which under the contract was to be delivered in December, 1918. There is some evidence that thereafter, and as late as March or April, 1919, defendants had urged plaintiff to accept the

third carload.

M. A. Macomber, defendant, testified that in February, 1919, he requested Mr. Emile of plaintiff company, to accept the third car of wax; that Emile replied that he could not take it and asked the witness "to hold it awhile longer;" that he, Macomber, later informed Emile that he would sell the wax on the market. The defendants appear to have had the wax on hand ready for delivery to plaintiff during the month of December, 1918, and there is evidence to the effect that plaintiff had failed not only to give the shipping instructions contemplated by the contract, but had expressly, after the month of December, 1918, refused to accept the material.

In Globe Brewing Co. v. Maiting Co., 247 Ill., 688, relied upon by plaintiff, the action was brought by a purchaser to recover for an alleged failure to deliver a quantity of malt contracted for, which was to be delivered as ordered by the purchaser. In the present case the suit is by the seller to recover for a failure on the part of the purchaser to accept the material contracted for. Here, we think, the evidence tends to show that the seller stood ready to deliver the material. If we are right in holding that the contract contemplated that the third carload of wax was to be held by the defendant subject to the receipt of shipping instructions from plaintiff, and that plaintiff had signified its intention not to receive the material, then it follows as a matter of course, that the defendants had a right under the law to sell the wax for the account of plaintiff and that defendants were entitled to recover damages based upon the difference between the contract price agreed to by plaintiff and the amount which defendants actually received for the material. The third carload of wax was sold by defendants in the market in small lots, the first of which was sold in May, 1919, for 8 3/4 cents a pound,

The last lot was sold September 23, 1919, at 6 3/4 cents a pound. No complaint is made of the action of the trial Judge in taking the larger sum, 8 3/4 cents, as a basis for determining the loss to defendants by the breach of the contract.

There is no merit in the point made that the damages assessed are excessive, nor that the proper measure of damages is the difference between the contract price and the market price in December, 1918. The goods were sold on the market and this is some evidence of the market price at the time of the sale. From the facts that the plaintiff did not give shipping instructions for the first two carloads to be delivered under the contract until December 28, 1918, that it did not thereafter indicate any positive refusal to accept delivery of the third car until April, 1919, that the third car was held by defendant until that time at the request of plaintiff, and that the delay in delivery was the result of plaintiff's own conduct, we think it may be inferred that the parties to the contract modified the contract so far as it related to delivery, and that the breach of the contract did not actually occur until the month of April, 1919, when the plaintiff definitely refused to accept the material.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely and Hatchett, JJ., concur.

321 - 26891

ALFRED H. WIEDHOFFT,
Appellee,

vs.

COMMERCIAL CAR UNIT COMPANY,
a Corporation,
Appellant.

2261A. 633

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

The defendant, Commercial Car Unit Company, a corporation, appeals from a judgment rendered against it in the Municipal court of Chicago in favor of the plaintiff, Alfred H. Wiedhofft, for the sum of \$1,140.

In his statement of claim plaintiff alleged that on or about July 1, 1916, he was employed as agent of the Hudford Company of Pennsylvania by E. H. Frank to sell automobile trucks; that September 16, 1916, as such agent, he had obtained an order from Andrew Murphy & Sons for six carloads, of 22 units each, of trucks upon which plaintiff was entitled to a commission of 2½ per cent. of the purchase price.

It is contended that there is not sufficient evidence in the record to show that the order for the six carloads of trucks was in fact consummated and communicated to and accepted by the Hudford Company in such manner as to render it liable for the commissions alleged to be due the plaintiff. Evidence in the record tends to show that one Mitchell on or about August 14, 1916, had taken over the business and assets of the Hudford Company and that later in October, 1916, these assets were conveyed to defendant. In testifying the plaintiff said that he took a first order for three units from Andrew Murphy & Sons in July, 1916; that later, on September 16, 1916, he obtained from the latter the larger contract; that under plaintiff's

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arrangement with the Hudford Company he was to be allowed a commission of 2½ per cent. on the purchase price on sales of the kind in question and that under the contract a deposit of 10 per cent. of the purchase price was required from persons to whom plaintiff might sell trucks; that Murphy & Sons, after the contract for the sale of the six carloads of trucks had been agreed upon, refused to advance the 10 per cent. deposit, giving as a reason therefor that it was not informed as to the financial responsibility of the Hudford Company; that to determine its responsibility Andrew Murphy of Andrew Murphy & Sons and his secretary had gone to Philadelphia to make investigations.

Plaintiff testified: "I sent the order in. As far as shipment is concerned, all I know of my own knowledge is that there were three units shipped by me as a part of that order;" that after Murphy and his secretary returned from Philadelphia a special contract was being drawn up eliminating the 10 per cent. deposit requirement; that "I went and took that order for the six carloads." Plaintiff further testified that a short time thereafter he received a telegram from the Hudford Company which advised him to "hold off on Murphy contract special contract in process of completion. Will forward direct on the twenty-first." September 16, 1916, a letter was mailed by the Hudford Company to plaintiff, in which the former stated that,

"Murphy was in here on Wednesday. They entered into a tentative arrangement covering the shipment of two carloads when they got back, and sent in their deposit."

October 7, 1916, the Hudford Company wrote to plaintiff as follows:

"Have at hand your letter of September 27th, and would say that the Murphy Co. have returned our contract, signed, but have struck out a very important clause. So we cannot say that the matter is closed until they accordingly sign the contract including this clause."

The letter of October 7th shows that Murphy & Sons had signed a contract with what is said to be an important clause stricken therefrom. Correspondence in the record indicates that the Hudford Company was pleased with the services rendered by the plaintiff. In one letter dated October 3, 1916, it states that it would call the attention of Mr. Davis, its sales manager, to the character of the work performed by plaintiff up to the date of the letter - "for instance the Murphy deal." It is objected that the correspondence was improperly admitted in that the signatures of the persons purporting to have signed the letters for the Hudford company had not been proved. The letters were properly admitted; they constituted a source of correspondence between the plaintiff and the Hudford Company, and many, if not quite all, of the letters were communications written to plaintiff in answer to letters sent by him to the company. Huhell Fertilizer Co. v. Jacobellis, 195 Ill. App. 410.

While there is some doubt arising out of the evidence as to whether the Hudford Company had in fact completed the deal for the six carloads of trucks with the Murphy Company, we think enough is shown thereby to give rise to a presumption that this contract was in some form ^{finally} consummated. The plaintiff's testimony is to the effect that he procured the order and that the Hudford Company thereafter notified him to "hold off" further efforts in connection therewith; that it was its intention to complete the arrangements with the Murphy company through its sales manager. This fact could not deprive the plaintiff of his right to commissions on the contract even if it were made to appear that the contract was finally made on terms and conditions different from those upon which the plaintiff by his contract of employment was authorized to make contracts for the Hudford Company.

Evidence introduced by defendant shows that the

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Commercial Car Unit Company took over all the assets and the business of the Hudford Company and assumed all of its liabilities which had accrued after August 14, 1916. The only testimony offered by defendant which tends to deny the execution of the contract with the Murphy Company is the testimony of a witness taken on written interrogatories, who said:

"To the best of my knowledge and belief, neither the defendant, Commercial Car Unit Company, nor the Hudford Company of Pennsylvania sold Hudford units to Andrew Murphy & Sons during the month of September, 1916. The Commercial Car Unit Company sold some units to Andrew Murphy & Sons at a period commencing about December, 1916."

This testimony does not directly contradict the definite statement of plaintiff that he had delivered the order for the six carloads of units to the Hudford Company. There is no direct proof that the contract was made by plaintiff with Murphy & Sons; that thereafter, through no fault of plaintiff, different tentative arrangements were made with Murphy & Sons. Whether these tentative arrangements, which changed the form of the contract that plaintiff was authorized to make, were in fact completed, was a matter which rested peculiarly within the knowledge of the Hudford Company or defendant, its successor.

In the case of City of Chicago v. Brunck, 170 Ill. App. 25, the court said:

"That the facts in this case justify the application of the recognized exception to such rule, that where the subject matter of a negative averment lies peculiarly within the knowledge of the defendant, the burden is cast upon him to disprove the same."

Defendant failed in response to a subpoena duces tecum to produce any of its books, records or papers, or a contract with Andrew Murphy & Sons which was called for under the subpoena. The subpoena was served upon defendant's attorney, who denied that such paper was ever in the possession of defendant.

In the case of Sackett v. Centaur Motor Company.

139 Ill. App. 372, the court said:

"When an arrangement with a prospective purchaser ripens into a sale, it gives a right to the agent to a commission for the reason that the agent's efforts are the efficient cause of the sale; *** that an agent under contract of employment is entitled to commissions on automobiles sold by his principal under 'arrangements' effected while in the principal's employ, although the cars are not delivered and paid for until after his discharge prior to the termination of his contract of employment."

As stated above, there is some evidence which tends to show that the contract for the sale of the trucks to the Murphy company was in fact entered into and the plaintiff's right to commission could not be abrogated by reason of the fact that the Hudford company or its successor had seen fit to take the making of the actual terms under which the goods were sold out of plaintiff's hands. Gould v. Riccardi, H. & B. Co., 136 Ill. App. 331.

It is further urged that the record shows a variance between the allegations of the statement of claim and the proof. In plaintiff's statement it is alleged that one Brush acted for the Hudford Company in making the contract of employment. Under the evidence there is some doubt as to whether this contract was made with one Hudson for the Hudford Company or with Brush. But whatever the truth of the matter may be, it is our opinion that the evidence introduced did not tend to prove a cause of action different from that alleged in the statement of claim. The substantive ground for recovery there alleged is that the Hudford Company had agreed through its agent to employ the plaintiff, and it is of no material consequence whether Hudson or Brush acted for it in the making of this contract. It is not disputed that plaintiff was employed by the Hudford Company. At the time of his employment both Brush and Hudson were present and both took part in the conversation with him. Brush thereafter

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on behalf of the Radford company, advanced plaintiff the sum of \$75.00, and he in other ways undertook to direct him in his work. The statement of claim definitely informed the defendant of the nature of plaintiff's action, and such variance as appears in the record between the statement and the proof is not so material as to warrant a reversal of the judgment. Hamlin v. Kinnear, 163 Ill. App. 51. In any event, it does not appear that any objection was made by defendant at the time the evidence was offered.

In the case of City of Joliet v. Johnson, 177 Ill. 181, the Supreme Court said:

"It is well settled that an objection alleging variance between the allegations and the proof must be made in the trial court, in order to afford an opportunity to the plaintiff to amend the declaration. Such objection should properly be made at the time the evidence is offered, otherwise it will be waived."

The question of a variance may be waived and, we think, was waived in the present case by defendant's failure to object to the evidence which was offered on the trial. Alford v. Dannenberg, 177 Ill., 331.

The judgment of the Municipal court is affirmed.

APPROVED.

McSurely and Hatchett, JJ., concur.

25 - 26947

THE GATES COMPANY,
a Corporation,)
) Appellee,

vs.

ARMSTRONG TIRE & VULCANIZING
CO., a Corporation,)
) Appellant.

2261A. 633

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

In a statement of claim filed in the Municipal court the plaintiff alleged that the defendant was indebted to it in the sum of \$1616.00 for certain goods delivered to defendant on July 8, 1920.

Defendant filed an affidavit of merits and a claim of set-off, which latter set out that on May 20, 1920, plaintiff sold defendant certain "second tubes;" that the term "second tubes" was known in the trade in which both plaintiff and defendant were engaged to indicate new tubes from which the manufacturer's name had been removed and which, as a result, did not carry the manufacturer's guaranty of quality; that the term "second tubes" did not designate used or patched tubes; that defendant had accepted the tubes at their invoice prices before it had an opportunity to examine them; that the tubes (1,406 in number) accepted by defendant were in fact held by defendant subject to the order of plaintiff, and that they were unmarketable, useless and of no market value as tubes. In brief, defendant's claim is that the tubes delivered to him were valueless; that the defendant had given a "trade acceptance" for the invoice prices of the goods, which acceptance had been offered to pay "to the bona fide holder thereof on July 8, 1920, the amount

of said ^{trade} acceptance," and that defendant had paid the same at maturity.

The defendant further charged that it did not discover the defective condition of the tubes until June 10, 1933. Defendant claims the right to set off the amount paid by it for the tubes against the demand of plaintiff.

On plaintiff's motion defendant's affidavit of merits and set-off were stricken from the files and judgment was entered in favor of plaintiff for the sum of \$1,610.90, from which judgment defendant appeals. It is conceded by defendant that a set-off is only allowable in this State where the demand arises out of the same transaction as that which gave rise to plaintiff's claim or that the set-off demand must be for a ⁸liquidated amount. Defendant insists that its demand is for a liquidated sum.

A further point is made that in that it appears by the affidavit of set-off that the plaintiff is a foreign corporation, the claim of defendant may, even though unliquidated and as an exception to the general rule be set off against plaintiff's demand. We think counsel for defendant is correct in saying that there is nothing in the record which shows that the order for the 1406 tubes was a part of a larger order, as no such allegation appears in the affidavit of merits or the claim of set-off. As charged in the claim of set off, defendant contracted to purchase 1406 tubes at \$1.15 each. It is stated that this agreement constituted a group of contracts corresponding in number to the number of tubes received; that a total sum had been paid for the 1406 tubes at \$1.15 each.

In Bank of Antigua v. Union Trust Co., 149 Ill., 343, the Supreme court said:

"The rule as laid down by Parsons (vol. 2, p. 517) is: 'If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable.' And Wharton (Sec. 748, Law of Contracts) says: 'When a consideration is divisible and the price can be appor-

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portioned, then, if a distinct divisible portion of the consideration fails, the price paid for such portion can be recovered back,' and that 'in cases ~~one~~ in which the consideration is divisible, the purchaser may elect to take what can be delivered to him, and in such case, if the purchase money has been paid, he can recover back the excess, or if there has been no payment, defend pro tanto.'"

We think there is merit in the contention that the contract which underlies the claim of set-off is severable at least in so far as it is claimed that any number of the tubes delivered were valueless and not in accordance with the terms of the contract.

Defendant in substance charges that under the contract the tubes which were to be delivered to it were to be new, but without the manufacturer's name thereon; that plaintiff in fact delivered to defendant worn, patched and defective tubes. At the time the contract was executed defendant had signed a "trade acceptance," which defendant says it was bound to and did pay before it had an opportunity to examine the tubes which had been delivered to it. Defendant's alleged right to recover arises out of the allegation that plaintiff had delivered to defendant tubes not in compliance with the terms of the contract. It is charged in the set-off that the defendant accepted and through the "trade acceptance" paid for the 1200 tubes which were billed to defendant at \$1.15 each. The claim in the set-off is for the return to defendant of the purchase price of the tubes. It is clear then, that the defendant's claim is not for an unliquidated sum.

It is further asserted that defendant has a right to set off his claim against plaintiff's demand, because it appears that plaintiff is a foreign corporation and this contention is supported by the cases of Ideal Coated Paper Co. v. Candler Inv. Co., 169 Ill. App., 484, and Missly v. Wainer, 211 Ill. App., 254. It is urged, however, that the decisions in these two cases are not sound, in that they failed to distinguish between a right of set-off

at common law and the rule applicable in equity.

In the case of Hessman v. Howell Meyers & Co., 220 Ill. App., 196, a plea of set-off, which was stricken, set up that the plaintiff was a non-resident of the State of Illinois. In deciding that case the court said:

"Nor are we cited to any decision of our Supreme Court holding that in an action at law the residence or non-residence of any of the parties is material. It is true there is language in Ideal Coated Paper Co. v. General Supplies Envelopes Co. and Wesely v. Vainer, *supra*, which might be construed to so hold, but an examination of these cases indicates that the authorities relied upon were decisions of courts of other states construing statutes essentially different from the statutes which control here; and, further, that these courts were evidently not required, as we are to distinguish between set-off^{at} law and equitable set-off. In equitable set-off the residence of the plaintiff and his insolvency are usually material."

In the case of Gunnther v. Miller, No. 26543, opinion filed November 15, 1921, (not yet reported) the same branch of the Appellate court which decided the Hessman case, *supra*, stated as follows:

"Plaintiff was a non-resident. Therefore defendant was entitled to file his claim of set-off for unliquidated damages and to a trial upon the merits. While it is true as a general rule that a demand for unliquidated damages cannot be the subject of a claim of set-off, yet it is well established by decisions of this court that an exception exists in a case where the plaintiff is a non-resident. There was a running account between the parties to this suit, and it would be unjust to allow the plaintiff to invoke the aid of the courts of this state to permit him to select some item of the account in his favor, bring suit on it in this state, and at the same time refuse to permit the defendant to make his defense, thereby compelling him to go to plaintiff's domicile to sue for the item due to the defendant on his account."

In the Wesely case, *supra*, it was held, as an exception to the general rule, that a claim for unliquidated damages may be set off in a suit at law by a non-resident plaintiff. As stated above, it is our opinion that defendant's claim is for a liquidated sum; but aside from this, and even if defendant's claim may be said to be one for unliquidated damages, it was available to defendant in a suit brought against it by a non-resident. Our attention has not been directed to any decision of the Supreme court or other

courts of review in this state, excepting only the Hayward case, SMITH, which distinguishes "between set-off at common law and equitable set-off." We are inclined to follow the decision in the Quemener case, SMITH.

The judgment of the Municipal court will be reversed and the cause remanded to that court with directions to vacate the order striking appellant's affidavit of merits and set-off from the files.

REVERSED AND REMANDED.

McSweeney, J., concurs.

Matchett, J., dissents.

1770. January 1st. The first of the year. The weather was
very cold. The wind was from the north. The
temperature was 10 degrees below zero. The
wind was very strong. The snow was very deep.
The ground was very hard. The trees were very bare.

1771. January 1st. The first of the year. The weather was
very cold. The wind was from the north. The
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wind was very strong. The snow was very deep.
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1772. January 1st. The first of the year. The weather was
very cold. The wind was from the north. The
temperature was 10 degrees below zero. The
wind was very strong. The snow was very deep.
The ground was very hard. The trees were very bare.

48 - 26985

JOHN J. BRADY, One of the Surviving
Partners of the Partnership of
Chytrous, Nealy & Frost,
Defendant in Error,

vs.

CORNELIA M. CATHERWOOD, MAUDE M.
CATHERWOOD, NAOMI CATHERWOOD
ROKANSOON and HELE M. ROKANSOON,
Plaintiffs in Error.

226 I.A. 633

ERROR TO CIRCUIT COURT

OF COOK COUNTY.

MR. JUSTICE SEVEN DELIVERED THE OPINION OF THE COURT.

By this writ of error to the Circuit court of Cook County the defendants seek to reverse a judgment entered in that court against them and in favor of the plaintiff for the sum of \$7983.53. The record made in the case and the questions presented here are substantially the same as in the case of Carl V. Wisner v. Cornelia M. Catherwood, Maude M. Catherwood, Naomi Catherwood Rokansoon and Hele M. Rokansoon, No. 26985, decided at the present term of this court, and for the reasons given in the opinion filed in that case, the judgment of the Circuit court will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and Matchett, J. J., concur.

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THE PEOPLE OF THE STATE
OF ILLINOIS,

Defendant in Error,

vs.

JAMIE RHODES,

Plaintiff in Error.

2261.A. 333

ERROE TO CRIMINAL COURT

OF COOK COUNTY.

MR. PRECEDING JUSTICE JAMES

DELIVERED THE OPINION OF THE COURT.

The defendant, Jamie Rhodes, was indicted at the June term 1930 of the Criminal court of Cook County. The indictment charged that defendant while living at 3344 South Calumet avenue, Chicago, prior to August 16, 1918, had stolen from the Peoples Gas Light & Coke Company 530,000 feet of gas of the value of \$54 per thousand feet. The indictment included a count for feloniously receiving the same property. On a trial a jury returned the following verdict:

"We, the jury, find the defendant, Jamie Rhodes, guilty of receiving stolen property, knowing the same to be stolen, for the defendant's own gain and to prevent the owner from again possessing the same, in manner and form as charged in the indictment, and we further find from the evidence the value of the property so received to be fourteen Dollars and Ninety-nine Cents (\$14.99.) And we further find from the evidence that the said defendant, Jamie Rhodes, is now about the age of 43 years."

Judgment was entered upon the verdict and the court sentenced the defendant to one year in the House of Correction and to pay a fine of \$100. The defendant seeks to reverse this judgment in this court.

Since the filing of the record and abstract of record in this court on motion of defendant in error the court on November 18, 1931, struck what purported to be a bill of exceptions from the files. We have, therefore, only the common law record before us. An examination of the record shows that

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the defendant was charged in the indictment with the commission of a felony on the 16th day of August, 1918. The verdict of the jury found her guilty of receiving stolen property of the value of \$14.98. The verdict then found defendant guilty of a misdemeanor and the judgment of the court upon the verdict imposed a sentence as for a misdemeanor.

It is contended by defendant that the Statute of Limitations has run against the crime. The only assignment of error which this court is authorized to consider on the record before us is the one which recites that "the court was without jurisdiction in entering judgment and imposing sentence." The court, having jurisdiction of the person of defendant and of the subject matter of the suit, had power to impose the sentence.

In a somewhat similar situation the Supreme court in Kelly v. People, 116 Ill., 563, said:

"The power to hear and determine a cause is jurisdiction. It is coram iudice whenever a case is presented which brings this power into action. (citing authorities.) In the case here of the former conviction, there was undoubted jurisdiction both of the subject-matter and person. The court had power to proceed to hear and determine. The judgment was not such an one as the court had no power, under any circumstances or upon any state of facts, to pronounce in such a case, but it was one within the power of the jurisdiction which had attached."

But whatever may be said as to this point, it is our opinion that the judgment of the trial court cannot be reversed. The only reason in the present state of the record that can be urged against the validity of the judgment is that the indictment charges a felony and the verdict and judgment thereon are for a misdemeanor. Were we permitted to examine the evidence it might be shown that as a matter of fact the eighteen months limitation statute applying to misdemeanors had run before defendant was placed upon trial. The date fixed in the indictment, however, is not conclusive and notwithstanding that it fixed the day of commission of the crime as August 16, 1918, it was per-

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missible on the trial to prove that the offense had been committed upon any day previous to the filing of the indictment.

In the case of People v. Gray, 251 Ill., 431, the Supreme court held that:

"It is necessary to allege in the indictment a day and year, but the time may be laid at any time previous to the finding of the indictment, during the period within which it may be prosecuted."

In the case of Katiles v. People, 221 Ill., 221, it was claimed that there was a variance between the proof and the allegations of the indictment. The proof tended to show that the crime was committed in August and September, 1906; while the indictment alleged it as having occurred on October 1, 1906. In deciding the case the court said:

"When the time of the commission of an offense is not of the essence it need not be precisely laid, and it is sufficient if it be laid at any time before the filing of the information and within the period of limitation. Proof that the offense was committed on any day within the period of limitation and before the information was filed was sufficient, and a conviction thereon could be pleaded in bar of any other information of indictment for the same offense alleged to have been committed on any day within that time."

In the case of People v. Bertsche, 245 Ill. 272, it was held that where different offenses were proved under an indictment as having occurred on different dates, the defendants might have asked the court to require the prosecution to elect upon which transaction or offense it would rely; that the evidence which showed distinct transactions did not create a variance, since the date alleged was immaterial.

The evidence not having been preserved by bill of exceptions, we are unable to hold that the judgment is erroneous. It is true that the indictment charged a felony. The indictment for receiving the property in question included the wide-scope crime of which the defendant was found guilty, and while the indictment charges that the offense for which the defendant was

indicted was committed more than eighteen months prior to the beginning of the trial, the evidence may well have shown, the date fixed in the indictment being immaterial, that the crime was actually committed within the 18 months period.

In the case of Thompson v. Peuple, 125 Ill., 286, the court said:

"We must suppose that the evidence sustained the verdict, and that no objection was urged that evidence was admitted which was applicable to one but which was not applicable to the other defendant; for, until the contrary is shown, it will be presumed the court decided correctly."

If the evidence upon which the conviction of the defendant is based had been preserved and was before us, and if it showed that the crime was committed more than eighteen months before the return of the indictment, the judgment of the trial court would have to be reversed. But on the record we are unable to say that the alleged crime was in fact committed more than eighteen months prior to the return of the indictment.

The judgment of the Criminal court is affirmed.

AFFIRMED.

McSurely and Hatchett, JJ., concur.

and it is very difficult to find any evidence of any kind of connection between the two. The only evidence that can be found is the fact that the two are both in the same place at the same time. This is not evidence of any kind of connection between the two.

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The only evidence that can be found is the fact that the two are both in the same place at the same time. This is not evidence of any kind of connection between the two.

In Re. ESTATE OF JACOB H.
SHAY, Deceased, HENRY W.
LEMAN, Proponent of the Last
Will and Testament of JACOB
H. SHAY, Deceased,

Appellant,

vs.

MARY BAYLOR,

Appellee.

226 I.A. 533

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

March 30, 1921, the Probate court of Cook County admitted to probate the last will and testament of Jacob H. Shay. An appeal was taken from this order to the Circuit court, which entered an order denying probate of the alleged will. From the latter order Henry W. Leman, proponent of the will, brings the case by appeal to this court.

In the trial court the subscribing witnesses to the will testified that the testator signed, sealed, published and declared the instrument to be his last will and testament in their presence and in the presence of each other; that they had at his request and in his presence and in the presence of each other signed their names to the instrument as witnesses and that they believed the testator at the time to be of sound mind and memory.

Henry W. Leman, proponent of the will, over his objection, was called as a witness by contestant. He testified that he was an attorney at law; that as such he had frequently advised testator and that he had drafted the instrument offered as the latter's will. The will directed that at the testator's death a collateral note for the sum of \$1000, executed by Henry W. Leman, was to be fully paid and cancelled and was to be surrendered to him with the collateral security.

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It is agreed that at the time of his death testator's estate amounted to about \$37,000. No provision was made in the will for the contestant or her sister, Mrs. Dety, or Gertrude Young, a niece of defendant. After providing for certain legacies the will directed that the residue of testator's estate, amounting to about \$20,000, was to be given to Henry W. Leman as trustee, to be used, invested and controlled by him, the income therefrom to be paid to Fanny O'Leary, deceased's sister, during her lifetime; the remainder at her death to vest in the Home for Crippled Children.

For the appellant it is insisted that the law in this State is that on appeal to the Circuit court from an order of the Probate court admitting a will to probate, a contestant has no right to call witnesses except for the purpose of proving that the execution of the will was obtained by fraud, compulsion, or other improper conduct. Appellee meets this proposition by asserting that undue influence will be presumed where a confidential relation exists between a testator and an attorney who prepares a will under which the latter is a substantial beneficiary. This much is conceded by appellant, but the latter asserts that unless the fiduciary relationship which gives rise to the presumption of undue influence is made to appear by the testimony of the subscribing witnesses, developed either upon direct or cross-examination, the will must be admitted to probate, where sufficiently supported by the subscribing witnesses; that neither the Illinois statute nor decided cases permit a contestant of a will to try the question of mental capacity or undue influence twice; that the law reserves to any interested party a right to file a bill to contest a will; that if contestant in the present case desires to contest the alleged will because of undue influence, she must file a bill therefor; that she will not be permitted to try that question twice, first by her appeal to the Circuit court, and second, by filing a bill to set aside the will.

It has been held that undue influence will be presumed where it appears that the person who drafts a will for a testator is a substantial beneficiary therein and occupies a confidential relation toward the testator such as attorney and client. In most of the cases where this principle is enunciated the contests were begun by the filing of a bill. Hayder v. Fiegle, 237 Ill., 129; Ham v. Bach, 278 Ill., 803; Yess v. Yess, 230 Ill., 414; Leonard v. Bartle, 226 Ill. 422, and Keaton v. Teufel, 215 Ill., 271. However, in the case of Wunderlich v. Quenzer, 327 Ill., 440, a writ of error was prosecuted to reverse an order of the Circuit court of Cook County admitting a will to probate on appeal from an order of the Probate court. In deciding that case the Supreme court said:

"The statute provides that the testimony of two subscribing witnesses shall be sufficient to admit the will to probate, provided that no proof of fraud, compulsion or other improper conduct be exhibited which in the opinion of the court is deemed sufficient to invalidate it. The cross-examination of Conrad developed the confidential relation existing between Wunderlich and Mrs. Becker."

It will be noted that the court in its opinion states specifically that the confidential relationship referred to was brought out by the cross-examination of one Conrad, a subscribing witness, called by the proponent of the will. It is conceded that in a will contest begun by the filing of a bill undue influence will be presumed where it appears that a beneficiary under the will has borne a fiduciary relationship toward the testator and has drafted the will, and, further, under the Wunderlich case, supra, and other cases cited, such presumption will be indulged even in case of an appeal to the Circuit court from an order of the Probate court admitting the will to probate where the fact of undue influence, by reason of fiduciary relationship or otherwise, is made to appear by the testimony of subscribing witnesses to the will.

In the Wunderlich case, 209 Ill., undue influence arising from confidential relationship was in the first instance made to appear in cross-examination of a subscribing witness presented by the proponent of the will. Thereafter, the latter was permitted to call several witnesses, whose testimony was held to overcome the presumption of undue influence raised by the testimony of the subscribing witness. We do not think that this decision modifies the rule laid down in other decided cases in this State.

In the case of Chandler v. Fisher, 200 Ill., 440, the Supreme Court said:

"The contestants of the will on an appeal to the Circuit court in such probate proceedings are confined to the testimony of the subscribing witnesses and to the cross-examination of the other witnesses offered by the proponents on the question of the mental condition of the testator."

In Bratt v. Hawley, 207 Ill., 264, the court said:

"The statute does not make the proceeding a strictly adversary proceeding in which rights are adjudicated, for the reason that interested parties, although notified and appearing, have no right to introduce evidence. No issue is made between those who assert and those who deny the validity of the will, and the purpose of the proceeding is merely to admit the instrument to probate and record as a will, leaving anyone who questions its validity to contest it. Parties do not have the privilege of trying the same question twice, first on the probate of the will and again on a bill in chancery, but a contestant must resort to his bill in chancery."

In the case of Hicks of Eritz v. Pierce, 106 Ill. 187, the court, speaking of the right of a will contestant to appear on an appeal to the Circuit court from an order of the Probate court, said:

"He has the right to appear and see the proponent of the will, by proper and legitimate testimony, make out a prima facie case warranting the admission of the alleged will to probate. When this has been done, and he is unable to produce satisfactory evidence of 'fraud, compulsion, or other improper conduct' sufficient to invalidate or destroy such will, and it does not otherwise appear from the evidence, he has done all the law permits him to do in that proceeding. If he has countervailing testimony upon the testator's sanity or capacity to make a will, he must resort to his bill in chancery."

But appellee contends that the evidence of Leman was offered for the purpose of showing that undue influence was used by him which amounted to fraud in the execution of the will. In the case of Linscomb v. Allen, 308 Ill., on page 418, the Supreme Court said that undue influence is a species of constructive fraud. It does not follow from this, however, that the contestant was entitled to call witnesses to prove the exercise of undue influence on the part of Leman. Some difficulty will be encountered if one attempts to make clear a distinction between constructive fraud and undue influence in the making of a will. It is our opinion, however, that a proceeding begun in the Probate Court for the admission of a will to probate, as stated in the Prait case, supra, is merely a proceeding to "admit the instrument to probate and record as a will, leaving anyone who questions its validity to contest it" by filing a bill in chancery. While undue influence may in some cases amount to constructive fraud, we think that the sense of the decided cases is that a contest of a will on this ground, as for mental incompetency, should be instituted by the filing of a bill in chancery, except, as stated, where such undue influence is shown by the testimony of subscribing witnesses.

Appellee urges that the alleged undue influence of the proponent of the will appears from the testimony of the subscribing witnesses. Culver, one of the subscribing witnesses, testified that he had no doubt but that Leman drafted the will, although he further stated in direct terms that he had no knowledge of who wrote the will. The testimony of this subscribing witness is also to the effect that the testator had called at Leman's office during a period of two years as often as every ten days or once a week, and that testator had consulted Leman in regard to certain matters; that witness did not recall any litigation. On the trial

Leman did say that he made the original draft of the will. We do not think the evidence of Culver is sufficient to establish prima facie a confidential relationship between the testator and Lemman, and it is our opinion that the testimony of Lemman was not admissible in this proceeding to prove this fact.

The judgment of the Circuit court will be reversed and the cause remanded for further proceedings in harmony with the views herein expressed.

REVERSED AND REMANDED.

McSarsely, P. J., and Matchett, J., concur.

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CHICAGO GRAVEL COMPANY,
a Corporation,
Appellant,

vs.

COMMONWEALTH IMPROVEMENT
COMPANY, a Corporation,
Appellee.

226 I.A. 634
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE DEAR
DELIVERED THE OPINION OF THE COURT.

In March, 1919, the plaintiff sold to defendant to be delivered at Roselle, Illinois, between April 1st and December 1st, 1919, certain quantities of washed gravel and tarpas sand. Defendant was engaged at Roselle in constructing a section of highway for the County of Cook.

The agreement provided that the material was to be shipped from Hammond Junction to Roselle, and that defendant was to pay therefor \$1.35 a cubic yard, less 40¢ a ton, or 60¢ a cubic yard, the then existing freight rate. The agreement was made orally and was later confirmed by a letter from plaintiff to defendant, which concluded as follows:

"Above price is based upon present freight rate remaining in effect, and any change in the same will revamp the above quotation accordingly."

It was provided that the inspection of the material was to be made at plaintiff's plant at Hammond Junction, where plaintiff produced gravel, only part of which was suitable for road building purposes. For this reason it is contended that the purchaser was to inspect the gravel at Hammond Junction before shipment.

Evidence was introduced on the trial which tended to prove that defendant had failed to inspect the material at

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plaintiff's plant and that as a consequence there was shipped to Roselle certain quantities of gravel which was not fitted for defendant's use and which was rejected when delivered at Roselle, by a county engineer who inspected the material. Thereupon a representative of defendant stated that he had material at Plainfield, Illinois, that would meet the requirements of the road building contract specifications. The parties then agreed that the gravel should be shipped from Plainfield to Roselle. It was stipulated on the trial that from June 18, 1919, to September 11, 1919, the plaintiff shipped to defendant from Plainfield 6095.2 cubic yards of sand and gravel to Roselle which was used in building the road.

The controversy centers around the circumstances which confronted the parties at the time of the rejection of the material shipped from Hammond Junction. It is evident that at this time the defendant was unable or unwilling to inspect the material before shipment from Hammond Junction, and hence the parties agreed that shipments might be made after June 18, 1919, from Plainfield, Illinois, where the defendant also had a plant which produced material fitted for the road work and which would not require inspection at the plant. Thereafter the material required was shipped from the latter place. The suit was brought to recover a balance due upon shipments made from Plainfield. The new agreement was made orally between Mr. Hammond for the plaintiff and Mr. Leininger for defendant. Mr. Hammond testified that he told Mr. Leininger that defendant could ship material from Plainfield, which was further from Roselle than Hammond Junction, at the price originally agreed upon, \$1.25 a cubic yard of 3000 pounds, provided plaintiff was allowed a deduction of 10¢ a ton from the freight rate between Plainfield and Roselle.

There is some material contradiction in the evidence as to what occurred and what was said at the time the new agreement

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was entered into, but the real matter in dispute between the parties is as to what deduction should be made for the freight charges paid on the material shipped from the Plainfield plant. For the defendant it is urged that the original contract, being in writing, could not be modified by the alleged subsequent agreement, which was oral. We think the original contract, whatever may be said as to the subsequent agreement, permitted the defendant to deduct from the purchase price of the material only the amount actually paid by way of freight charges, and we are unable to find that the subsequent agreement, if it may be called such, modified the contract in this particular.

Mr. Hammond and Mr. Leininger contradict each other with reference to what was said concerning deductions for freight rates on the material which was to be shipped from Plainfield, but we think from our examination of all the testimony and the original agreement that the plaintiff did not agree to, nor did it intend to permit a deduction for freight rate charges greater than that actually paid therefor. The evidence shows that the material was shipped to Roselle to Cook County Commissioners and that the amount charged as freight rate thereon was 50¢ a ton. The purchaser, however, deducted from the amount due defendant 80¢ a ton and not the amount actually paid as freight charges. Although Mr. Leininger testified that he had not agreed to pay increased freight rates, we think the record discloses that it was the clear intention of the parties to provide only for a deduction from the purchase price of the material the amount actually paid as freight thereon. The rate usually paid on shipments from Plainfield was 60¢. The gross price of the material was to be \$1.25 a cubic yard, from which was to be deducted, as we held, 50¢ a ton, or 75¢ a cubic yard. The plaintiff insists that it had the right to deduct 60¢ a ton, or 90¢ a cubic yard, as freight charges on the material. This would leave a net price coming to the defendant of only 35¢ a cubic yard, whereas under the original

the first thing I saw when I stepped out of the car was a vast, open landscape. The ground was covered in a thick layer of snow, and the air was cold and crisp. In the distance, I could see the silhouettes of trees and buildings, but they were too far away to make out clearly. I took a few steps forward, feeling the snow under my feet. The sun was low in the sky, casting a soft, golden light over the scene. I felt a sense of peace and tranquility, as if I had found a hidden gem in a world of chaos. The snow was so deep that I could hardly see the ground beneath it. I walked slowly, savoring the moment. The only sound I heard was the crunch of snow under my boots. It was a beautiful sight, and I felt lucky to be there. The landscape was so serene and peaceful, it was almost unreal. I had never seen anything like this before. The snow was so pure and white, and the air was so clean. It was a perfect day, and I was so lucky to be here. I felt a sense of wonder and awe, as if I had discovered a new world. The snow was so deep that I could hardly see the ground beneath it. I walked slowly, savoring the moment. The only sound I heard was the crunch of snow under my boots. It was a beautiful sight, and I felt lucky to be there. The landscape was so serene and peaceful, it was almost unreal. I had never seen anything like this before. The snow was so pure and white, and the air was so clean. It was a perfect day, and I was so lucky to be here. I felt a sense of wonder and awe, as if I had discovered a new world.

contract the net price to be paid for the material shipped from Hammond Junction was to be 65¢ a cubic yard, less 15¢ a cubic yard, which defendant offered to prove was allowed for truckage and commission. The fact of the matter is that defendant without authority from plaintiff deducted from the purchase price more than was actually paid as freight charges for the material shipped from Plainfield. Due to the fact that the material was shipped in care of a municipal corporation, the freight charges were reduced 10¢ a ton or 15¢ a cubic yard, and the defendant seems to be of the opinion that this reduction should inure to its benefit. We do not think so, as on the whole evidence and on the admitted facts and circumstances of the case defendant was not permitted to deduct more than was actually paid on this account.

Whatever may be the facts as to the alleged subsequent agreement, about which there is much dispute in the evidence, we think it appears from the relations of the parties, the nature of the subject matter of the contract and the facts and circumstances shown by the evidence that neither party at any time agreed that defendant was to be permitted to deduct from the purchase price of the material furnished more than the amount actually paid for freight charges. There was sufficient evidence to warrant a finding that the original contract was modified by a subsequent oral agreement, but in any event defendant was not entitled to deduct more than the freight charges paid.

The judgment of the Municipal court must be reversed and a judgment entered in this court in favor of the plaintiff for the sum of \$961.38, the balance which plaintiff insists is due on the purchase price of the material furnished defendant.

REVERSED AND JUDGMENT HERE.

McSurely and Matchett, JJ., concur.

[illegible]

REGENSTEIN-VANDER COMPANY,
a Corporation,

Appellee,

vs.

SAMUEL B. PANAMA and R. KROMER,
Doing Business as PANAMA & KROMER,
Appellant.

226 I.A. 634

APPEAL FROM SUPERIOR COURT.

COOK COUNTY.

MR. PRESIDING JUSTICE DYER

DELIVERED THE OPINION OF THE COURT.

This case was tried in the Superior court of Cook County before the court and a jury. Judgment was entered in favor of the plaintiff for the sum of \$5,650, from which defendant appeals.

The action was brought to recover damages for an alleged breach of a contract entered into on April 12, 1920, under which plaintiff agreed to purchase from "Panama & Kromer" a quantity of blank book binders board. The contract on behalf of the vendor was signed, "Panama & Kromer, by R. Kromer, Panama & Kromer," and for the vendee it was signed "Regenstein-Vander Company, Joseph Regenstein, Secretary."

Both defendants, Rubin Kromer and Samuel B. Panama, by plea denied the existence of a partnership between them on April 12, 1920, the date of the execution of the contract, and the principal issue before the trial court was whether the defendants were partners at the time. It is admitted that the contract was executed in the absence of the defendant Panama. Panama was President of the Chicago Leather & Mercantile Company, which did a general manufacturing and merchandise business. Kromer at and before the time the contract was entered into was engaged in the purchase and sale of army and navy supplies. Panama testified that some time before the execution of the contract he and Kromer had bought "some board" and that they bought it together; that they had had deals with one

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Haggerty for the sale of board material; that in the transaction of this business they found it convenient to establish a joint bank account under the name of "Panama & Kromer;" that this account was used in the deals with Haggerty, but that "in these other deals that we had we did not use that." Evidence in the record tends to show that this joint bank account was closed on March 9, 1920, invoices totaling about \$34,000 had been rendered to Haggerty under the name of "Panama & Kromer, Chicago." These transactions occurred on different dates between November 22, 1919, and February 12, 1920. Checks given in payment for this material were made payable to Panama & Kromer and were endorsed under this name for deposit. Evidence shows that from November, 1919, to April, 1920, the defendants secured quantities of merchandise from the United States government at the Rock Island Arsenal, which they afterwards sold. Haggerty testified that he had business deals with Panama and Huben Kromer in 1920 "with reference to Manila paper and board;" that in connection therewith he met defendants at his, Haggerty's, office in the latter part of March or the first part of April, 1920.

Mr. Regenstein, for the plaintiff, testified that April 14, 1920, he called upon the defendant Panama at the latter's office to secure the bills of lading covering the goods contracted for; that both defendants were present at the time; that Panama had in his possession a duplicate of the contract; that he, the witness, said to Panama that he had come for the bills of lading covering the cars of board which the witness had purchased; that Panama in reply stated that he, the witness, was not going to get the stock because he had purchased it at too low a figure; that a tentative sale of it had been made to another party and a deposit made as a binder; that even if the proposed tentative sale did not go through he, Panama, could always make the plaintiff take it. This testimony is directly contradicted by that of Panama. The witnesses who testified for the

parties to the suit contradict each other in material ways. Panama denied that he and Kromer were partners at the time the contract was entered into, although Kromer, who was called as a witness for plaintiff, testified that he had purchased the material and signed the written contract on behalf of "Panama & Kromer" immediately after he had had a telephone conversation with Panama.

It is complained that the telephone conversation was improperly admitted in evidence. We do not think so. There was sufficient evidence, if believed by the jury, to warrant the finding, aside from the telephone conversation, that a partnership existed between defendants; at least a sufficient prima facie showing was made thereof, and the proof on this issue is sufficient aside from any admissions said to have been made by Kromer. The telephone conversation was had between Kromer and Panama on the day that the contract was entered into. The material had been offered to plaintiff a few days before the contract was signed and plaintiff had the proposition of its purchase under consideration. April 12th Regenstein for plaintiff, and Kromer agreed upon a purchase price for the material, but before signing the contract Kromer called Panama on the 'phone. Witnesses for plaintiff testified that Kromer said that he talked on the telephone with Panama and that he read the contract to him over the 'phone; that he, Kromer, then hung up the receiver and said, "Panama says it's all right; that I should sign it."

Regenstein testified that at the time he demanded of Panama the delivery of the material the latter had made no objection that Kromer had assumed to act for him as his partner.

In the case of Conlan v. Mead, 172 Ill. 13, the court said:

"But where sufficient evidence has been given to raise a fair presumption that two or more persons are partners, then the acts and declarations of each are admissible as evidence against the others, for the purpose of strengthening the prima facie case already established. (Lindley on Partnerships, 86, 87; 1 Greenleaf on Evidence, Sec. 117.) If Conlan, by his declarations or acts held himself out as a partner of the firm, as declared in

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the instructions, a prima facie case was established, and then the declarations of Watson, the other partner, were admissible."

Daugherty v. Mackard, 189 Ill. 239.

The verdict of the jury is not manifestly against the greater weight of the evidence. The court did not err in refusing to give an instruction tendered for the defendants. The instruction told the jury that in determining whether the defendants were partners at the time the contract was executed, the jury would have no right to consider any testimony concerning the alleged telephone conversation with Panama. As intimated above, it is our opinion that sufficient evidence was introduced to establish prima facie a partnership between defendants, aside from what occurred at the time of the telephone conversation. Kramer's admissions and statements made in the presence of witnesses at the time the telephone conversation was had were admissible on the issue of defendant's joint liability.

It is our opinion that no reversible error occurred on the trial of the case.

The judgment of the Superior court is affirmed.

AFFIRMED.

McEurely and Hatchett, JJ., concur.

ALBERT A. KRAFT,
Appellee.

vs.

OSCAR E. BROOKS,
Appellant.

2201A. 634
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE DEVEN
DELIVERED THE OPINION OF THE COURT.

By his appeal to this court the defendant seeks to reverse a judgment entered against him in the Municipal Court of Chicago and in favor of the plaintiff for the sum of \$104.72. Plaintiff bases his right to recovery upon an allegation in his statement of claim that while he, plaintiff, owned certain premises and for a period of about three years the defendant, without the consent and against the will of plaintiff, trespassed thereon and used the same; that on April 12, 1916, defendant had acknowledged that he had used the said premises and had agreed to pay plaintiff the sum of \$25. for such use; that defendant had thereafter continued to use the said premises to store wagons and building implements thereon and as a thoroughfare and was legally bound to pay for the use thereof.

In his affidavit of merits the defendant alleged that he did not know that plaintiff was the owner of the premises in question until about April 10, 1916, when he received a letter notifying him of the latter's ownership; that a part of the premises in question had been generally used as a public drive for more than twenty years prior to November 18, 1915; that he, the defendant, had not used the part of said premises in question after April 10, 1916, and that he never offered plaintiff \$20 or any other sum for the use thereof.

As the judgment in the suit is to be reversed and

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the cause remanded to the trial court for a new trial, we express no opinion upon several questions raised in the Brief filed by defendant.

There is a direct contradiction in the evidence as to whether the parties on or about April 10, 1916, had entered into an agreement for the payment by defendant for the use of the premises to that date. But whatever may be the truth of the matter, we are inclined to agree with the contention of defendant that plaintiff did not show by a preponderance of the evidence that the defendant in fact used the premises in question after April 12, 1916.

The plaintiff testified that defendant had agreed to pay \$20 for the use of the premises prior to that date and plaintiff's claim in the main is for defendant's alleged use of the property for some time thereafter. Defendant denied that he had ever promised to pay plaintiff any sum for the use of the premises.

A part of plaintiff's testimony is to the effect that "the City took the lot and paid me \$450 for it, the interest on this amount at 5 per cent. per annum for the time Mr. Brooks used it and the taxes on the lot would amount to \$104.72, and this, in my opinion, would be fair, reasonable sum for damages for its use."

We think this evidence is insufficient to show the fair rental value of the property in question. But the evidence in fact does not show that the defendant used the premises after April 12, 1916.

On direct examination plaintiff testified that he discovered that his lot was being used for storage of building materials and as a driveway, "evidently by the party who owned the adjoining premises;" that he made trips to the lot and "saw that it was still being used for the purposes mentioned up to and about the 3rd of May, 1916." On cross-examination, however, he said, "I never saw Mr. Brooks drive his wagon over the northern part of said lot, or on the cement sidewalk. There were wagon

tracks on sidewalk. marks made by wheels of wagons passing over it, and I believe these to have been tracks made by Dr. Brooks' wagon." This testimony is not sufficient to overcome the positive statement of defendant that he had not used the premises after April 12, 1916.

The judgment of the Municipal court is reversed and the cause is remanded to that court.

APPEALER'S ATTORNEY.

McSurely and Hatchett, JJ., concur.

L. APPELLAN,
Appellee,
vs.
MICHAEL STERN,
Appellant.

2201A. 634

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MEYER
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court of Chicago to recover the sum of \$175 for labor and material alleged to have been furnished by plaintiff to defendant at the latter's request. Judgment was entered in favor of the plaintiff for the sum of \$175 and defendant brings the case by appeal to this court.

In a statement of claim the plaintiff alleged that he had installed six toilets in premises in Chicago, for which defendant had agreed to pay him \$150, and that he, plaintiff, had performed certain extra work on the premises, for which defendant was charged the sum of \$25.

On the trial the plaintiff testified that he installed toilets and vaults in the premises known as 1157 North Leavitt street, owned by defendant; that the plaintiff performed the work for a general contractor, one Levy; that before the work was completed plaintiff informed defendant that he, plaintiff, was "afraid for my money," and that defendant had said, "You don't be afraid for the money, I will pay you." On July 15, 1921, after the completion of the work, Levy gave plaintiff an order upon defendant for the payment of \$150 for the work performed by plaintiff.

The testimony of plaintiff and his witnesses is to the effect that the defendant had made a direct and absolute

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promise to pay for the work performed and material furnished by plaintiff, and that this promise was made both before and after the completion of the work. It is true that this testimony is denied by defendant. But we think sufficient evidence was introduced on the trial to warrant the finding and judgment in favor of the plaintiff. The findings of the trial court were not against the manifest weight of the evidence.

Complaint is made that there is a variance between the evidence and the allegations of the statement of claim. The suit, begun in the Municipal court, is of the fourth class and the issue, as has been so often said by this court, is what the evidence made it. It is true that the contract for the doing of the work was originally made with Levy, the general contractor, but the evidence tends to prove that the plaintiff refused to proceed to complete the work until, as plaintiff states, the defendant had agreed to pay him therefor.

The testimony of plaintiff and his witnesses tends to show that the claim of plaintiff does not rest upon an alleged promise of defendant to pay the debt of another.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

161 - 27136

EVANGELOS GALLIOS,
Appellee,

vs.

THE COLUMBIA ICE CREAM
COMPANY, a Corporation,
Appellant.

226 I.A. 634
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Municipal court of Chicago in favor of the plaintiff for the sum of \$60 for wages and a further sum of \$10 attorney's fees taxed as costs.

The case was tried before the court without a jury. The evidence shows that plaintiff was employed by defendant as a bookkeeper from the 1st day of February, 1920, until April 23, 1920, at a salary of \$120 a month. Plaintiff left defendant's employ on the latter date, at which time it is admitted there was due him for salary the sum of \$120, and it is conceded that there was due plaintiff a further sum of \$750 for money loaned by him to defendant corporation. At the time plaintiff left the employ of defendant he drew a check in his own favor for the sum of \$180; \$60 of this sum is in dispute between the parties. Plaintiff's position is that he was informed when he entered the service of defendant that he was to work Sundays but was to have a week day off in lieu thereof. Plaintiff testified that he never received the day off as agreed. He received during the course of his employment one check, which bore the notation, "In full of wages for & up to week ending March 31, 1920." Plaintiff's claim is for services rendered by him on twelve Sundays at the rate of \$5 a Sunday. On May 15, 1921, the defendant paid plaintiff by check the sum of \$608.50. This latter

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sum represents what defendant insists is the full amount with interest due the plaintiff on his loan of \$750 to defendant. Over the protest of the plaintiff defendant deducted from the amount due plaintiff the sum of \$60, which defendant insists is the amount overpaid plaintiff for wages. Defendant's vice president testified that the \$60 was deducted because plaintiff had said to him that if defendant was not satisfied that the \$60 was due plaintiff, then defendant might "take it from the other check I have coming." Plaintiff testified that he made out the check payable to himself for \$180 for wages without any understanding with defendant as to a deduction out of the \$750 loaned defendant.

The judgment of the Municipal court must be affirmed. There is no bona fide dispute shown by the evidence with reference to the \$750 loan made to the defendant. This amount was loaned to defendant and no part of it was repaid until defendant had delivered to plaintiff the check for \$398.30. This check bore on its face the statement, "Paid in full to date for wages & etc." The check was admittedly given to plaintiff as part payment of the sum loaned to defendant. It was not a payment for wages and plaintiff is not bound by the statement. The check for \$180 delivered to plaintiff at the time he left defendant's employ was signed by defendant's president and treasurer. At this time there was due the plaintiff a further sum of \$750 with interest and this latter fact is not in dispute. There was, it seems, at one time a dispute between the parties as to whether the \$60 was due the plaintiff for wages at the time he left the employment of defendant. Plaintiff at this time insisted that the latter sum was due him and the defendant executed and delivered to him a check for \$180.

It is insisted that the judgment should be reversed because of a claimed variance between the statement of claim and the

evidence introduced. It is true that in testifying the plaintiff said that he had been paid all the wages due him when he received the check for \$180, and the statement of claim charges the defendant with an indebtedness of \$60 for wages due plaintiff. The issue, however, on the trial, as shown by the evidence introduced, was whether the defendant had a right to deduct the \$60 from the check delivered in payment of the loan. Notwithstanding plaintiff's statement that he had been paid all the wages due him, we think it apparent from the evidence that the question in controversy at the trial was whether defendant was indebted to plaintiff in the sum of \$60 for wages. If the theory advanced on the trial by defendant is accepted as the true one, then the issue at the trial was the question of what wages, if any, were due plaintiff. Defendant's position on the trial was that it had paid the \$780 loaned in two separate amounts, one for \$60, included in the \$180 check, and the balance by delivering the check for \$372.50. In other words, defendant tried the case on the theory that it had paid the loan in full with interest and that it was not indebted to plaintiff in any sum for wages.

The issues in a fourth class case in the Municipal court^{*} are what the evidence makes them, and in this case, on the theory of defendant at least, the issue was one of wages.

It is further urged that the court erred in allowing the sum of \$10 as attorney's fees. It is said that a bookkeeper is not a wage earner. Counsel rely upon a decision by the Illinois Appellate court in the case of Wainley v. Hecmar, No. 26518, (not yet reported.) We do not regard this decision as attempting to modify the rule laid down in an elaborate opinion by Mr. Justice Sears in the case of Hastman v. Jannan, 84 Ill. App., 544, affirmed by the Supreme Court, 184 Ill., 144. In the Appellate Court decision the court said:

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"Bookkeepers, or persons employed to make sales of merchandise or of property manufactured by the corporation, are, we think, 'employees' within the meaning of the act, and their compensation earned is 'wages' whether such persons are employed by the day or month or year, and whether the compensation is denominated salary or wages in the contract of employment."

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely and Hatchett, JJ., concur.

198 - 27158

ELIAS WEISS,
Appellee,
vs.
A. G. BOGGIANO,
Appellant.

2261.A. 635

GENERAL JUDGE MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained a judgment in the Municipal court of Chicago against defendant for the sum of \$500 and defendant appeals.

Plaintiff brought suit to recover \$500 from defendant which plaintiff alleges he deposited with the latter as security. On February 10, 1916, one Morris Cariner leased certain premises from defendant Boggiano for a term of ten years. Cariner on February 10, 1916, assigned the lease to Elias Weiss, plaintiff. Defendant, over his own signature, consented to the assignment and acknowledged the receipt of the sum of \$500 deposited as security for rentals for the balance of the term of the lease, "said sum to be held as security for this lease, and at the expiration of this lease the sum to be returned to Mr. Elias Weiss."

Weiss, the plaintiff, testified ~~XXXXXXXXXXXXXXXXXXXX~~ ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXX~~ that he moved from the premises August 15, 1919; that on the 14th day of July his creditors had sold out a part of plaintiff's goods located in the premises; that at this time his rent was paid for the month of July. August 6, 1919, defendant in writing notified plaintiff that he, defendant, had leased the premises to one Levitan for a term beginning August 1, 1919; that Levitan had paid the August, 1919, rent for the premises and that "as you have broken your lease by not complying with

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its terms, I hereby notify you to give up possession of the premises to Mr. Levitan in 5 days. You are also to adjust whatever rent is due Mr. Levitan from the 1st of this month."

We do not think the verdict and judgment are against the weight of the evidence. Plaintiff and defendant directly contradict each other with reference to the \$500 deposit. Plaintiff's testimony is supported by the receipt for the amount signed by defendant. While the evidence is conflicting, we think the jury and trial Judge were in a much better position to judge of its weight than are we.

The evidence tends to show that defendant leased the premises to Levitan for a term beginning August 1, 1919. If the plaintiff was not in default, then the defendant directly violated the contract with plaintiff. Defendant indicated in the most positive manner his purpose to evict plaintiff from the premises. But in any event the defendant should not be permitted to retain the \$500 deposited with him as security. It does not appear that any actual damages were sustained by the defendant by reason of plaintiff's failure to pay rent for the premises for the month of August, or if damages had accrued to defendant they are easily ascertainable.

In the case of Dunn v. Hatenberg et al., 308 Ill. App. 300, this court said:

"Where a lessor elects to take advantage of his legal right to terminate a lease for the failure to pay rent on the part of the lessee, and such lessee is dispossessed of the premises by due process of law, such lease, under the decisions in this State, must be regarded as terminated and the contractual relationship between the lessor and the lessee thereby dissolved. Snell v. Owen, 63 Ill. App. 377; Faber v. May, 133 Ill. App. 244. Under the circumstances shown by the evidence it must be held that the defendants, the lessors of the premises, had, by their own act, chosen to put an end to the lease, to secure the performance of the terms and conditions of which the deposit in question was made. ***** The evidence justified the inference that she (tenant) was dispossessed of the premises for the reason that she had failed to pay rent due under the lease. The damage which accrued to the defendants from the violation of this promise was readily and definitely ascertainable by reference to the lease. These damages would amount to \$150 for each month that she failed to pay the rent agreed upon. Under

such circumstances it would be most inequitable to allow the defendants to retain the amount deposited with them."

In the case of Radloff v. Maene, 196 Ill. 368, the Supreme Court said:

"Whether the term 'liquidated damages' is used or not, the idea of the courts is to ascertain, if possible the actual damages sustained, and if it is possible to ascertain the actual damages, or if the amount of liquidated damages mentioned in the contract is exorbitant, the court will construe the amount as a penalty, rather than as liquidated damages. It is said in the Deefield case, supra, that the phrase 'liquidated damages' has often been made to read 'penalty' if the strict construction of the phraseology would work oppression upon the obligor, or, if the enforcement of the contract would be unconscionable, the courts will then construe the amount named in the contract as a penalty. And it seems from all the cases that, whatever may be the wording of the contract, the courts will admit evidence as to whether or not the strict enforcement of its provisions would work a hardship upon the obligor."

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely and Hatchett, JJ., concur.

THE FOLLOWING INFORMATION IS FOR THE USE OF THE
OFFICE OF THE SECRETARY OF THE ARMY

AND THE OFFICE OF THE SECRETARY OF THE NAVY

(When filled in)

1. NAME OF THE PERSON OR PERSONS TO WHOM THIS
LETTER IS ADDRESSED: (If the letter is addressed to
more than one person, give the name of each person.)
2. ADDRESS OF THE PERSON OR PERSONS TO WHOM THIS
LETTER IS ADDRESSED: (If the letter is addressed to
more than one person, give the address of each person.)
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more than one person, give the title of each person.)
4. NAME OF THE OFFICE OR OFFICES TO WHICH THIS
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LETTER IS ADDRESSED: (If the letter is addressed to
more than one office, give the name of each office.)

THE PEOPLE OF THE STATE
OF ILLINOIS,

Appellee,

vs.

HUDOLPH ROSENER,

Appellant.

226 I.A. 635
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Defendant, Hudolph Rosener, by prosecuting an appeal to this court seeks to reverse a judgment entered against him in the Municipal court of Chicago in a proceeding begun in that court by the People of the State of Illinois.

Defendant was charged on information in the trial court with having engaged in the practice of medicine and surgery without obtaining a license therefor, as provided by the statutes of the State of Illinois. Defendant filed an abstract of record and also a printed brief and argument in this court and thereafter on March 4, 1933, the Attorney General of the State of Illinois filed a written motion for the sole purpose of dismissing the appeal on the ground that the cause being a criminal case, this court has no power to review the judgment of the trial court/that a judgment in a criminal case can only be reviewed in this court by writ of error. The record before us shows that the offense of which the defendant was found guilty is a misdemeanor.

In the case of People v. Johnson, 286 Ill. 194, the Supreme court held that a conviction in the Municipal court for a misdemeanor is reviewable by a writ of error only and not by appeal. "The only method of reviewing a criminal case is by writ of error. (French v. People, 77 Ill., 531.)" It is urged, however,

no qqqq;

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that the Medical Practice Act of 1917 under which defendant was convicted has been declared unconstitutional and that as a consequence an appeal will lie to this court to correct what is said to be an erroneous judgment. We do not agree with this contention. The point made that the act has been found to be unconstitutional can no more be raised in this court on appeal than can any other objection to the judgment. Under the law this court cannot review by appeal a judgment entered in a criminal case however erroneous that judgment may be.

The appeal is dismissed.

APPEAL DISMISSED.

McSurely and Hatchett, JJ., concur.

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PEOPLE OF THE STATE OF ILLINOIS
ex rel. Albert W. Grantier,
Defendant in Error,

226 I.A. 635

SUPREME TO CIRCUIT COURT

vs.

OF COOK COUNTY.

CITY OF CHICAGO, WILLIAM MALE
THOMPSON, Mayor; CHARLES C.
WHEALY, Superintendent of Police,
and PERCY B. COFFIN, CHARLES E.
FRAZIER and JOSEPH P. CLARY, as
Civil Service Commissioners of
the City of Chicago,
Plaintiffs in Error.

MR. PRESIDING JUSTICE McGRATH
DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review a mandamus proceedings to compel respondents to reinstate Albert W. Grantier, the relator, in the Police Department of the City of Chicago. Respondents' demurrer to the petition was overruled. Respondents elected to stand by their demurrer, and judgment was entered according to the writ. We are asked to reverse the judgment and relator does not appear here to contest.

A number of valid reasons are presented for reversal. Under the circumstances we note only one of these. The petition alleges that relator was unlawfully reduced in rank on January 31, 1907. The petition was filed January 8, 1916, nearly nineteen years after the event complained of, and no valid excuse is offered for the delay. This delay is sufficient to bar the right of petitioner to the relief sought. Preston v. City of Chicago, 246 Ill. 36, 38; Schulthais v. City of Chicago, 240 Ill., 167; Clark v. City of Chicago, 233 Ill., 113; Way v. City of Chicago, 225 Ill., 310; Blake v. Lindblum, 225 Ill., 538; City v. Wendell, 224 Ill. 598; Kennally v. City of Chicago, 220 Ill., 485.

The judgment of the Circuit court is reversed and the cause is remanded with directions to enter an order sustaining the demurrer and to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS.
Dever and Hatchett, JJ., concur.

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JACK LUND and ETHEL KENDALL LUND,
Copartners Doing Business as
"MERRY GARDEN,"

Appellees,

vs.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,
Appellant.

226 I.A. 635

APPEAL FROM SUPERIOR COURT

OF THE STATE OF ILLINOIS.

MR. PRESIDING JUSTICE McGRATH

DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit upon a burglary insurance policy issued to them by the defendant, and upon trial by the court had a finding and judgment for \$3063.12. From this judgment defendant appeals.

The policy insured against loss by burglary on the premises at 6040 Cottage Grove avenue, Chicago, to the limit of \$3,000, for a period from October 2, 1915, to October 2, 1920. It was provided therein that the policy did not cover loss "if assured, any associate in interest, or servant, or employee of the assured, or any member of his household, or any other person lawfully upon the premises is implicated as principal or accessory in effecting or attempting to effect the burglary." Defendant claims that the burglary in question came within this exempting provision of the policy, and hence defendant is not liable.

The facts as stipulated are as follows:

"4. On the 24th day of November, 1919, at about three o'clock in the morning, the premises covered by the insurance under said policy and schedule were guarded by a night watchman employed by the plaintiffs. At the time above mentioned three outlaws were observed by the night watchman alighting over the fence in the rear of said premises. The night watchman shot at one of the men and frightened the three of them away. The night watchman endeavored to call the city police, but could not get telephone communication from said premises. He then went out of the premises to notify the police, and in going away therefrom

THE
STATE OF
NEW YORK
IN SENATE
JANUARY 18, 1892

REPORT
OF THE
COMMISSIONERS OF THE
LAND OFFICE
IN RESPONSE TO A
RESOLUTION PASSED
BY THE SENATE
MAY 1, 1891

ALBANY:
J. B. LEECH, STATE PRINTER, 1892.

THE STATE OF NEW YORK, 1892.

THE COMMISSIONERS OF THE LAND OFFICE, IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE MAY 1, 1891, HAVE THE HONOR TO SUBMIT TO THE SENATE THE FOLLOWING REPORT.

THE LAND OFFICE, NEW YORK, JANUARY 18, 1892.

THE COMMISSIONERS OF THE LAND OFFICE, IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE MAY 1, 1891, HAVE THE HONOR TO SUBMIT TO THE SENATE THE FOLLOWING REPORT.

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THE LAND OFFICE, NEW YORK, JANUARY 18, 1892.

he observed an automobile, with what appeared to be peaceable citizens in it. He told them his trouble and they told him they would take him to the police station. Pursuant to their invitation he entered the automobile, when they, under threat of killing him, took away his revolver. They then drove away from the premises and met the three men who had been frightened from the building, and told them to go and finish the job of burglarizing said premises.

"8. That said gang went immediately to said building and 'jimmied' open an outside door, making a burglarious entry into said premises, by force and violence; that when they had gotten inside the premises they then, by the use of a high explosive, blew open the vault door; then with a hammer they broke open the inner door of the vault and when in the vault they by the use of a hammer knocked the knob off the combination lock to the safe, which was inside of the vault, and in the hole thus made they put a high explosive and blew the whole door off said safe, and thus in they stole from the inside thereof the sum of three thousand and forty-seven dollars (\$3,047), no part of which has ever been recovered, and all of which said money was the property of the plaintiffs; that the robbery or burglary of said premises, so made, was in pursuance of a plan made between one Lawrence Mitchell and said other outlaws; that up to the time of said happenings said Lawrence Mitchell was employed by plaintiffs from time to time as a floor man, to work for them in observing order on the dance floor during such times as they were having public dancing; that prior to said November 24th said Lawrence Mitchell had approached the premises with said outlaws for the purpose of burglarizing the premises, but had abandoned the attempt to make a burglarious entry on account of the police being present.

"9. That on the night of November 23 to 24th, 1919, he was present at said premises in the performance of his duties, and after leaving the premises for the night went to a rendezvous agreed upon between himself and said outlaws, about one half mile away from said premises, and did not again enter the premises, although he returned to the vicinity of the premises and saw the police shooting at the burglars; that he was to have a share in the loot obtained from said premises, which share was to be two hundred and fifty dollars (\$250.00).

"10. The employment of said Lawrence Mitchell by the plaintiffs was only on the basis that he should work for them whenever they would call upon him to do so, either on Saturdays or Sundays, or holidays, when they were engaged in having public dances; that upon such occasions they would pay him five dollars (\$5) per night for his services. He was not at any time employed upon a weekly or monthly basis of employment of said plaintiffs, and he had nothing to do with handling the funds of plaintiffs or of keeping their books."

Do these facts show that Lawrence Mitchell was a servant or employe of the insured and implicated as principal or accessory in effecting or attempting to effect the burglary? "An accessory is he who stands by, and aids, abets or assists, or who, not being present, aiding, abetting or assisting, both advised, encouraged, aided or abetted the perpetration of the crime. He who

thus aids, abets, assists, advises or encourages shall be considered as principal and punished accordingly." Criminal Code, Sec. 611, Statute, Cahill. The burglary was in pursuance of a plan made between Mitchell and the other outlaws while he was employed by the plaintiffs, and pursuant to the plan he met the outlaws at a rendezvous to receive his share of the loot. It would do violence to the meaning of the language to say that he was not implicated as principal or accessory in the burglary.

Mitchell was employed as floor man when plaintiffs were conducting public dancing, which generally took place on Saturdays, Sundays or holidays, and would receive five dollars a night for such services. It was a few hours after he had finished his services for the night that the burglary ^{in question} took place. Therefore, it is argued by plaintiffs, he was not an employe or servant of the assured at the exact time of the burglary. We do not think this is sound. While employed by plaintiffs he participated not only in the plan to commit the crime, but also in a prior attempt. It is a fair assumption that the plan of operation resulted from his familiarity with the premises and the custom with reference to the disposition of plaintiffs' receipts of money. One who is not present at the actual moment of the commission of the crime is an accessory under the statute who "hath advised, encouraged, aided or abetted the perpetration of the crime." It is evident that all these things were done by Mitchell while employed by the plaintiffs, hence his crime of being an accessory to the burglary was committed while an employe, and he was implicated as principal or accessory in effecting the burglary.

A majority of the court is of the opinion that the facts establish the conditions with reference to the implication of a servant or employe of the plaintiffs in the burglary which

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make operative the provision of the insurance policy above referred to exempting defendant from liability thereon. It follows that the judgment must be reversed and, as there can be no recovery, judgment of nil capiat is entered in this court.

REVERSED WITH JUDGMENT OF NIL CAPIAT.

Dever, J., concurs, and Hatchett, J., dissents.

27369
411 - 27369

OSIE BAILLARD,
Appellee,

vs.

EASTER LILY CLUB, a Corporation,
Appellant.

2261A. 636

APPEAL FROM JUDICIAL COURT
OF CHICAGO.

THE HONORABLE JUSTICE MCGONIGLE
DELIVERED THE OPINION OF THE COURT.

Defendant seeks the reversal of an adverse judgment for \$75 had by plaintiff in an action to recover funeral benefits.

Defendant is a fraternal benefit society, incorporated not for profit. In consideration of certain payments from members made at intervals, defendant undertakes to pay benefits to a disabled or sick member, and in case of death \$75 for funeral expenses. Plaintiff is the daughter and sole surviving heir of Lillie Stevenson, deceased, and seeks to recover this amount.

By-laws provide that the funeral benefits will be paid upon the death of one who has been a member for one year prior thereto, and defendant claims that Lillie Stevenson, at the time of her death, had not been a member for this length of time. She died June 15, 1910, and some witnesses testify that she joined the club in July of the previous year, as shown by certain records of the organization. To meet this plaintiff introduced in evidence a card, which was identified by one of the officers of the defendant as the financial card issued by it, showing receipts of dues and assessments from members. This card bears the signatures of a secretary of defendant and purports to show that Lillie Stevenson commenced her payment of dues in February, 1917, and continued substantially each month thereafter to pay dues until about the time of her last illness and her death. The receipt of dues and assessments beginning with

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February, 1917, strongly tends to support plaintiff's claim that her mother joined defendant's organization at that time, and hence had been a member for over a year at the time of her death. Such was the opinion of the trial court upon the facts, and there is not sufficient evidence in the record to cause us to disagree.

The other matter of defense concerns the age of Lillie Stevenson. The constitution provides that:

"All respectable women between ages of 16 and 40 years old will be eligible for membership. Any person who joins this club under a false statement pertaining to age or otherwise, and the same is found to be true, she will not be allowed to receive sick benefits, neither will she be allowed to receive any death benefits, and her name shall be dropped from the roll-book of the club."

Defendant says that Mrs. Stevenson had passed the eligible age at the time she became a member, hence, under this constitutional provision, should not be allowed to receive any death benefits.

This provision is a little ambiguous as to the status of a person over 40 years of age who becomes a member of the defendant society. It does not clearly state that such a person shall not receive any death benefits. However, assuming that the provision was intended to deprive an over-age member of such benefits, the record fails to show that plaintiff's mother had passed the eligible age at the time she became a member. There is no definite evidence as to her age. We have opinions of certain persons who were for the most part officers of the defendant corporation, that she appeared to be an old woman. They differ as to the years of her age, although none ventures an opinion as to less than fifty.

Opinion evidence as to age, based upon appearance, is sometimes admissible, but in the present instance the officers of the defendant corporation are estopped from raising the defense of age based upon the member's appearance. They had been collecting

dues and assessments from her for over a year, had seen her frequently and had visited her in her illness according to the rules of the society, and at the funeral had given a floral emblem, as was the custom. No one seems to have questioned her eligibility as to age until after the funeral. Defendant's officers cannot now be permitted to avoid its obligation because of their opinion based upon the physical appearance of the deceased, which did not deter them from receiving dues and assessments from her as a member in good standing.

We see no sufficient reason to disagree with the finding of the trial court, and the judgment is affirmed.

APPROVED.

Dever and Hatchett, JJ., concur.

465 - 27423

MORRIS LILIENTHAL et al.,
Appellees,

vs.

F. H. MATTHEWS & COMPANY,
a Corporation,
Appellant.

226 I.A. 636

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSHERRY
DELIVERED THE OPINION OF THE COURT.

Defendant seeks by this appeal the reversal of a judgment against it of \$2068.16, entered upon trial by the court.

We have twice heretofore considered this case. See opinions in 208 Ill. App. 302, and 215 Ill. App. 160. We shall therefore not repeat the details. Plaintiffs bring suit to recover the price of certain garments sold and delivered to defendant. Defendant asserted a counter claim based upon alleged damages because of the breach of plaintiffs' contract not to sell garments like those sold defendant to other persons doing a similar business in designated parts of Chicago.

The only point presented in defendant's brief upon the present appeal is, that by the contract two dollars per garment was agreed upon as liquidated damages for each garment sold by plaintiffs to other parties, contrary to the contract.

In our first opinion in this case we held that this contract was unilateral and so far as its provisions may be said to be executory, it is so indefinite and uncertain in its terms as to be unenforceable, although it might be considered in determining the terms upon which goods had been sold and delivered. Defendant's contention in the first appeal was that it was entitled to recover general damages and not the two dollars allowance referred to in the writing. Apparently on the present appeal they seek

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to recover damages at the two dollar rate.

Whatever may be the obligations under the contract, defendant has failed to show that plaintiffs breached it in any particular. An ineffectual attempt was made to prove this, but we are of the opinion the trial court was justified in ruling that the evidence failed in this respect. If plaintiffs sold similar garments to prohibited customers, it should have been easy for defendant to have produced some of them as well as the garments they themselves had purchased, so that the court might judge as to the fact of the alleged breach. The garments were not introduced in court and no explanation given as to this. On the other hand, witnesses testified for plaintiffs that garments of the same design were not sold to other parties.

Defendant failed in its defence and no sufficient reason has been presented for reviewing the judgment, which is affirmed.

APPELLED.

Hatchett and Dever, JJ., concur.

ALEXANDER BRYLINSKI,
Plaintiff in Error.

226 I.A. 636

ERROR TO

vs.

SUPERIOR COURT,

COOK COUNTY.

LOAN ASSOCIATION OF THE SERRAVALLO
OF ALL SAINTS PARISH,
Defendant in Error.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On January 14, 1918, plaintiff in error filed his bill in equity in which he alleged that on November 20, 1912, he entered into a verbal agreement with defendant, the terms of which are set forth in detail, but which in substance were that complainant would borrow \$3,300 from defendant, to be used by defendant for the purpose of obtaining the title to certain premises described in the bill of complaint and the decree; that complainant executed a trust deed conveying the premises as security therefor; that contrary to the terms of said agreement, the title to said premises was taken in the name of defendant; and that thereby the defendant became a trustee of the title for complainant's benefit.

The bill, as originally framed, prayed that a master's deed under which defendant took title to the premises might be declared null and void and a cloud on complainant's title, and that the same might be delivered up and cancelled; that a writ for possession begun by defendant in the Municipal Court of Chicago might be enjoined and other relief given. By an amendment to the bill complainant afterwards offered to do equity in paying any sums found to be due from him to defendant, and further prayed that an accounting might be taken, finding what was due under the terms of the trust deed, and the other terms and conditions under which it was given, and the defendant

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should be required to execute and deliver a warranty deed of the premises to the complainant, and that upon its failure so to do "within the time fixed by this court," the master in chancery might be directed to do so.

Defendant answered, denying the material facts as alleged in the bill as amended, and the cause was referred to a master, who took the evidence and filed a report, to which no exceptions were taken, and which the decree (entered without objection) approved. The record, which is by principle, does not contain the master's report nor the evidence. But the decree finds the facts to be as follows: About January 12, 1912, the premises in question were acquired by Agnieszka Brylinski. On January 18, 1912, she and her husband Josef executed their trust deed conveying the premises to Ralph I. Verwilliger, to secure their note of \$2,000 due five years after date. December 22, 1913, they executed a further trust deed on the said premises to Samuel Nicon, securing their indebtedness of \$1,000. July 24, 1913, two several judgments were obtained against them in the Municipal Court of Chicago, and February 10, 1914, executions issued on the judgments were levied. Default was made in the payment of the notes secured by the Nicon trust deed, and the owners began suit to foreclose the same. On May 13, 1914, a decree of sale was entered, and the premises were sold on June 8, 1914, to Nicon for \$1,100, and he received the usual master's certificate of sale therefor. Josef Brylinski disappeared, and his whereabouts are unknown. Agnieszka Brylinski and the complainant at that time resided on the premises, and complainant, with the consent of his mother Agnieszka desired to acquire title to the premises in question. He made application to the defendant for the loan of \$8,300, and appeared with his attorney before a meeting of the board of directors of the defendant corporation October 7, 1913, advised them of the dis-

appearance of the father, and stated that he desired to obtain a loan of \$3,300 to pay off the outstanding claims of Samuel Wicon and the loan of \$2,500, which was then held by the Home Bank & Trust Co. He advised the directors that he had made arrangements with Wicon whereby the master's certificate held by Wicon could be obtained, and that, when the same matured September 9, 1916, a master's deed would be procured to him and title thereby established in him.

The negotiations were completed October 30, 1915, and the check was drawn by the officials of the defendant association to the order of complainant, endorsed by him, and returned to the treasurer of the Association, who, in turn, delivered it to Walter Jassicki, who was official notary of defendant. November 20, 1915, the complainant signed an agreement which stated that he had borrowed from the defendant \$3,300, and in consideration therefor promised to pay \$8.25 upon Saturday of each week until said payments should equal that amount, and that he would also pay 6 per cent interest on said sum on the first Saturday in each and every month until the principal sum should be repaid. As further security for the payment he executed a trust deed of that date, conveying and warranting the premises to one Gowronski. This trust deed was duly acknowledged and recorded.

In the month of December, 1915, complainant and defendant purchased from Wicon the certificate of sale, and received the same endorsed in blank by Wicon. The amount then claimed to be due under the Wicon foreclosure was \$1,257.50, of which \$1057.50 was paid from the proceeds of the loan, and the balance by complainant. About December 13, 1915, there was due to the Home Bank & Trust Co., the sum of \$2411, plus interest upon the principal note of \$2300 from July 13, 1915, to December 13, 1915. Defendant permitted default to be made on this mortgage and a

bill was subsequently filed to foreclose it. Defendant filed its answer in the foreclosure proceedings; a decree of sale was entered therein on January 9, 1917, finding due the sum of \$2644.10 and \$300 solicitor's fees and costs of suit. The premises were sold under the decree on February 7, 1917, to Walter Jaseicki for \$5,000 and a master's certificate delivered to him therefor. September 25, 1917, he, Walter, assigned the said certificate to Paul Gowronski, who on January 4, 1918, assigned it to the defendant. August 24, 1918, defendant obtained a master's deed upon the certificate of sale to Samuel Wilson, which was duly acknowledged and recorded.

The decree further finds that the defendant had full information and knowledge of the purpose of the complainant to use the Wilson foreclosure as a means of clearing up the title to the premises and to establish the same in himself subject to the lien of the trust deed to Paul Gowronski; that Walter Jaseicki representing defendant repeatedly failed and refused to carry out such arrangements, claiming that there was not sufficient money in his hands to pay the amount due; that the defendant should have obtained the master's deed to the premises under the Wilson foreclosure on September 9, 1918, and that the title would then have been encumbered only by the trust deed to the Home Bank & Trust Co.; that it was the duty of the defendant, and it was bound under its agreement to take the title to the premises in complainant's name, and the actions of defendant in taking title thereto in itself gives it the legal title as trustee only for the use and benefit of complainant; that defendant should have completed the purchase of the indebtedness of the Home Bank & Trust Co. prior to the filing of the bill of complaint, and thus have saved the large amount of costs and solicitors' fees which accrued thereunder; that defendant had expended monies for taxes and interest for which it is entitled to credit; that defendant is willing, upon repayment of the amount

will not be necessary to find a suitable place for the same. The first object of the present investigation is to find out the proper position for the same. The second object is to find out the proper position for the same. The third object is to find out the proper position for the same. The fourth object is to find out the proper position for the same. The fifth object is to find out the proper position for the same. The sixth object is to find out the proper position for the same. The seventh object is to find out the proper position for the same. The eighth object is to find out the proper position for the same. The ninth object is to find out the proper position for the same. The tenth object is to find out the proper position for the same.

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due to it, to convey to the complainant the title of the premises; that the amount due on July 31, 1920, is \$3709.14; that the material allegations of the complainant's bill of complaint, as amended, were proved and are true, and that defendant holds title to the premises in question for the complainant, subject to the amount due it, and that upon payment of said amount the defendant should be directed to execute and deliver to the complainant a deed to the premises to secure the release by Paul Gowerski, releasing the trust deed to him. "It is therefore ordered, adjudged and decreed that the complainant pay to the defendant the sum of \$3709.14 on or before July 3, 1921, together with 5% interest per annum from July 31, 1920, to the date of payment, together with all monies paid out by defendant for insurance premiums, taxes, special assessments and improvements after July 31, 1920; that upon the payment being made the defendant convey and deed all its right in and to said premises to the complainant; that in default of complainant to pay said sum, and in the time provided in this decree, the complainant's bill do stand dismissed; that if the premises are not redeemed in accordance with this decree, the complainant be forever barred and foreclosed from all equity of redemption and claim of, in and to said premises, and every part and parcel thereof which shall not have been redeemed."

Although it does not appear that any objection was made to the decree at the time it was entered, the complainant has sued out this writ of error to secure a reversal, because, he says, a court should not have decreed that if the premises were not redeemed in accordance with the decree, the complainant should be barred and foreclosed from all equity of redemption. Plaintiff in error contends that this amounts to a strict foreclosure, and that in lieu of this provision the decree should have provided that if the amount due was not paid, the real estate should be sold in order

to pay the amount, subject to complainant's right to redeem in equity. In support of this contention plaintiff in error cites Sheldon v. Patterson, 48 Ill., 511; Trotter v. Smith, 59 Ill., 541; Scott v. Milliken, 60 Ill., 111; Mason v. Shewalter, 88 Ill., 153; Carpenter v. Plazze, 192 Ill., 82.

The contention is a novel one in view of the pleadings. The complainant obtained a decree, which we must presume was based upon the evidence, which was in harmony with the theory of the bill and the relief prayed for. He specifically stated in his bill that he was ready and willing to pay such sums as might be found due, and does not now deny that the sum as found to be due is correct. The complainant filed the bill and defendant did not file any cross-bill nor seek affirmative relief. The cases cited by complainant hardly sustain the point for which he contends. In Sheldon v. Patterson, supra, the opinion was filed at the September term of the Supreme court, 1870. In that case a bill had been brought to foreclose a mortgage, and it was there held error to decree a strict foreclosure, where it did not appear that the mortgagor was insolvent or that the mortgaged premises were ^{of} insufficient value to satisfy the debt. Trotter v. Smith, supra, was a pure bill to redeem and the question here raised was not in any way involved or discussed there. Mason v. Shewalter, supra, was a case where a party, taking a deed, absolute on its face but in fact as security, having conveyed the title to a third party was held liable in assumpsit to the grantor and heirs. In Carpenter v. Plazze, supra, the complainant filed a bill to redeem, and the defendant filed a cross-bill to foreclose, and the decree entered granted relief under both bill and cross-bill. It was there held that since foreclosure was granted on the cross-bill, the right of redemption of the complainant should have been preserved by the decree. The court said:

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"The ordinary decree on allowing parties to redeem from a mortgage, is that the complainant be allowed to redeem the premises upon payment of the sum found to be due, within a reasonable time to be fixed therein, together with costs, and directing the defendant to discharge the mortgage or to convey the property to the complainant, if the defendant holds a deed instead of a mortgage as security on the payment of the money, and that in default of such payment within the time specified, the bill be dismissed. (*Decker v. Kattin*, 120 Ill., 444; *Walsh v. Brown*, 160 id. 416; *Chicago & Halsted Rolling Mill Co. v. Quilly*, 141 id., 408; *Brewer v. Canal & Dock Co.*, 127 id., 464; *Harpur v. Elx*, 58 id., 179.) But this is not merely a bill to redeem, it is also a bill to foreclose. While the original bill of the appellants seeks redemption, the cross-bill of the appellee seeks a foreclosure of the master's deed, regarded as a mortgage for the security of the title indebtedness.

The cause came on to be heard upon the making of the final decree, and relief was granted, not merely upon the original bill, but upon the cross-bill also. As the main relief granted is the foreclosure of a mortgage, the court below should have ordered a sale of the property, so as to permit the appellants to redeem the same in accordance with the provisions of the statute."

Scott v. Miller, supra, was a case where Miller had in 1864 taken title to certain lands under a direct foreclosure, and made valuable improvements thereon. Scott, the defendant, in the foreclosure proceedings, and holder of the legal title, appeared within three years, as under the Chancery statute he had a right to do, he having been served only by publication, and answered the original bill. He also filed a cross-bill to which Miller was made defendant. The court decreed that Scott might redeem by paying the amount of the mortgage debt and the value of the improvements estimated at \$12,000, and that in default of redemption the premises should be sold. The principal question in the case was whether Miller was entitled to receive pay for the improvements which he had made. The court held that he was, but also held that he had no claim on Scott's title to the lands other than the lien of the mortgage; that the court should have ascertained the value of the land independently of the improvements, and if it did not exceed the amount of the notes held by complainants when they filed their bill, then he should be permitted

The following is a list of the names of the persons who have been appointed to the various committees of the Board of Directors of the American Red Cross, for the year 1917-1918. The names are given in alphabetical order, and the committees to which they are appointed are given in parentheses. The names of the persons who have been appointed to the various committees of the Board of Directors of the American Red Cross, for the year 1917-1918, are given in alphabetical order, and the committees to which they are appointed are given in parentheses. The names of the persons who have been appointed to the various committees of the Board of Directors of the American Red Cross, for the year 1917-1918, are given in alphabetical order, and the committees to which they are appointed are given in parentheses.

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to redeem in 90 days by paying the debt, improvements, taxes and costs; that if the land did not equal in value the amount of the debt, a decree of sale would be useless and should not be made. On the other hand, if the value of the improved land should exceed the debt, that a decree of sale should be made instead of a strict foreclosure.

The bill in the instant case does not allege that the premises are more valuable than the amount of the indebtedness; it is not a bill to foreclose, and it is not framed on that theory. Indeed the complainant has no mortgage to foreclose. The bill was primarily one to have a trust declared, and for leave to redeem from the Micon foreclosure. It alleged that the complainant was willing to pay.

The decree of sale with the privilege to redeem would be inconsistent with that offer, and inconsistent with the theory on which the bill was brought. Having obtained what his bill asked for, a decree in conformity with its allegations and prayer for relief, complainant now appeals and asks that this decree be reversed. We do not think his contention can be sustained. In Taylor v. Hillsburg, 168 Ill., 237, the Supreme court in considering a decree entered on a bill brought to redeem, said:

"What is a reasonable time in which to redeem ***** rests in the sound discretion of the court."

And again in Hodman v. Quirk, 217 Ill., 162, where a junior mortgagee brought a bill to redeem from the foreclosure of a senior mortgage, the court said:

"The time in which the redemption shall be made rests in the discretion of the court."

But defendant has not asked that his mortgage be foreclosed. Complainant elected to bring a bill in which he alleged his willingness to pay the indebtedness secured by the mortgage. He asked the legal benefits which law and equity give, only upon

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the condition that he is ready and willing to pay. Having obtained these benefits, he now seeks relief inconsistent with his offer to pay. He cannot "blow hot and cold" at the same time. He is not entitled to a decree based on the double theory that he is ready and willing to pay and that he is not ready and willing to pay.

The foreclosure of the mortgage given by complainant to defendant is not involved in this proceeding. The decree should not contain any language which would have the effect of depriving the complainant of his equity of redemption. The complainant should be decreed to pay the sum found due in a reasonable time, and in default thereof his bill should be dismissed, but his equity of redemption should not be foreclosed.

Upon the original hearing of this cause the court was of the opinion that a slight modification of the decree would prevent a construction being placed thereon, which would amount to a foreclosure of complainant's equity of redemption under the mortgage. A petition for rehearing has convinced us that even with that modification, the decree might still be so construed as to have that effect. The decree will, therefore, be reversed and the cause remanded, with directions to enter a decree in conformity with the views expressed in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

McGuire, P. J., and Dever, J., concur.

The first thing I noticed when I stepped out of the car was the cold. It was a sharp contrast to the warm blanket I had been sitting under. I looked around, trying to get my bearings. The street was empty, the only sound being the distant hum of traffic. I felt a little disoriented, but I knew I had to keep moving. I started walking, my feet hitting the cold pavement. The air was crisp, and I could feel my lungs filling with it. I was alone, but I wasn't scared. I was determined to find my way out of there.

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THE END

ALFRED W. BILBEE,
Plaintiff in error,

vs.

LOAN ASSOCIATION OF THE MEMBERS
OF ALL SAINTS PARISH,
Defendant in error.

226 I.A. 636

BRIEF TO HONORABLE COURT

OF COMMON PLEAS.

MR. JUSTICE KATZMANN DELIVERED THE OPINION OF THE COURT.

On January 14, 1918, plaintiff in error filed his bill in equity in which he alleged that on November 20, 1915, he entered into a verbal agreement with defendant, the terms of which are set forth in detail, but which in substance were that complainant would borrow \$5,000 from defendant, to be used by defendant for the purpose of obtaining the title to certain premises described in the bill of complaint and the Record; that complainant executed a trust deed conveying the premises as security therefor; that contrary to the terms of said agreement, the title to said premises was taken in the name of defendant; and that thereby the defendant became a trustee of the title for complainant's benefit.

The bill, as originally framed, prayed that a master's deed under which defendant took title to the premises might be declared null and void and a cloud on complainant's title, and that the same might be delivered up and cancelled; that a suit for possession begun by defendant in the municipal court of Chicago might be enjoined and other relief given. By an amendment to the bill complainant afterwards offered to do equity in paying any sums found to be due from him to defendant, and further prayed that an accounting might be taken, finding what was due under the terms of the trust deed, and the other terms and conditions under which it was given, and the defendant should be required to execute and deliver a warranty deed of the premises to the complainant, and that

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THE
OFFICE OF THE
ATTORNEY GENERAL
WASHINGTON, D. C.

TO THE HONORABLE SENATE AND HOUSE OF REPRESENTATIVES

IN SENATE, FEBRUARY 11, 1903.
 REPORT
 OF THE
 ATTORNEY GENERAL
 IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE
 MAY 11, 1902.
 CONCERNING THE
 PROCEEDINGS OF THE
 ATTORNEY GENERAL
 IN THE CASE OF
 THE
 UNITED STATES
 VS.
 THE
 AMERICAN
 TRADING
 COMPANY.
 BY
 J. H. M. [Name]
 ATTORNEY GENERAL.

upon its failure so to do "within the time fixed by this court," the master in chancery might be directed to do so.

Defendant answered, denying the material facts as alleged in the bill as amended, and the cause was referred to a master, who took the evidence and filed a report, to which no exceptions were taken, and which the decree (entered without objection) approved. The record, which is by principle, does not contain the master's report nor the evidence, but the decree finds the facts to be as follows: About January 12, 1912, the premises in question were acquired by Agnieszka Brylinaki. On January 18, 1912, she and her husband Josef executed their trust deed conveying the premises to Ralph I. Yerville, to secure their note of \$3,500 due five years after date. December 22, 1913, they executed a further trust deed on the said premises to Samuel Micon, securing their indebtedness of \$1,000. July 24, 1915, two several judgments were obtained against them in the Municipal court of Chicago, and February 18, 1916, executions issued on the judgments were levied. Default was made in the payment of the notes secured by the Micon trust deed, and the owners began suit to foreclose the same. On May 13, 1915, a decree of sale was entered, and the premises were sold on June 8, 1915, to Micon for \$1,100, and he received the usual master's certificate of sale therefor. Josef Brylinaki disappeared, and his whereabouts are unknown. Agnieszka Brylinaki and the complainant at that time resided on the premises, and complainant, with the consent of his mother Agnieszka desired to acquire title to the premises in question. He made application to the defendant for the loan of \$3,500, and appeared with his attorney before a meeting of the board of directors of the defendant corporation October 7, 1913, advised them of the disappearance of the father, and stated that he desired to obtain a loan of \$3,500

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to pay off the outstanding claims of Samuel Nison and the loan of \$2,500, which was then held by the Home Bank & Trust Co. He advised the directors that he had made arrangements with Nison whereby the master's certificate held by Nison could be obtained, and that, when the same matured September 9, 1916, a master's deed would be procured to him and title thereby established in him.

The negotiations were completed October 30, 1915, and the check was drawn by the officials of the defendant Association to the order of complainant, endorsed by him, and returned to the treasurer of the Association, who, in turn, delivered it to Walter Jancicki, who was official notary of defendant. November 20, 1915, the complainant signed an agreement which stated that he had borrowed from the defendant \$3,306, and in consideration therefor promised to pay \$6.25 upon Saturday of each week until said payments should equal that amount, and that he would also pay 6 per cent interest on said sum on the first Saturday in each and every month until the principal sum should be repaid. As further security for the payment he executed a trust deed of that date, conveying and warranting the premises to one Gervonski. This trust deed was duly acknowledged and recorded.

In the month of December, 1915, complainant and defendant purchased from Nison the certificate of sale, and received the same endorsed in blank by Nison. The amount then claimed to be due under the Nison foreclosure was \$1227.50, of which \$1057.50 was paid from the proceeds of the loan, and the balance by complainant. About December 15, 1915, there was due to the Home Bank & Trust Co. the sum of \$2411, plus interest upon the principal note of \$2500 from July 15, 1915, to December 15, 1915. Defendant permitted default to be made on this mortgage and a bill was subsequently filed to foreclose it. Defendant filed its answer in the foreclosure proceedings; a decree of sale was entered

tered therein on January 2, 1917, finding due the sum of \$2644.10 and \$300 solicitor's fees and costs of suit. The premises were sold under the decree on February 9, 1917, to Walter Jasciaki for \$3,000 and a master's certificate delivered to him therefor. September 25, 1917, he, Walter, assigned the said certificate to Paul Gowronski, who on January 4, 1918, assigned it to the defendant. August 24, 1918, defendant obtained a master's deed upon the certificate of sale to Samuel Nison, which was duly acknowledged and recorded.

The decree further finds that the defendants had full information and knowledge of the purpose of the complainant to use the Nison foreclosure as a means of clearing up the title to the premises and to establish the same in himself subject to the lien of the trust deed to Paul Gowronski; that Walter Jasciaki representing defendant repeatedly failed and refused to carry out such arrangements, claiming that there was not sufficient money in his hands to pay the amount due; that the defendant should have obtained the master's deed to the premises under the Nison foreclosure on September 2, 1918, and that the title would then have been encumbered only by the trust deed to the Home Bank & Trust Co.; that it was the duty of the defendant, and it was bound under its agreement to take the title to the premises in complainant's name, and the actions of defendant in taking title thereto in itself gives it the legal title as trustee only for the use and benefit of complainant; that defendant should have completed the purchase of the indebtedness of the Home Bank & Trust Co. prior to the filing of the bill of complaint, and thus have saved the large amount of costs and solicitors' fees which accrued thereunder; that defendant had expended monies for taxes and interest for which it is entitled to credit; that defendant is willing, upon repayment of the amount due to it, to

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convey to the complainant the title of the premises; that the amount due on July 31, 1930, is \$3707.14; that the material allegations of the complainant's bill of complaint, as amended, were proved and are true, and that defendant holds title to the premises in question for the complainant, subject to the amount due it, and that upon payment of said amount the defendant should be directed to execute and deliver to the complainant a deed to the premises to secure the release by Paul Gowronski, releasing the trust deed to him. "It is therefore ordered, adjudged and decreed that the complainant pay to the defendant the sum of \$3707.14 on or before July 8, 1931, together with 5% interest per annum from July 31, 1930, to the date of payment, together with all monies paid out by defendant for insurance premiums, taxes, special assessments and improvements after July 31, 1930; that upon the payment being made the defendant convey and deed all its right in and to said premises to the complainant; that in default of complainant to pay said sum, and in the time provided in this decree, the complainant's bill do stand dismissed; that if the premises are not redeemed in accordance with this decree, the complainant be forever barred and foreclosed from all equity of redemption and claim of, in and to said premises, and every part and parcel thereof which shall not have been redeemed."

Although it does not appear that any objection was made to the decree at the time it was entered, the complainant has sued out this writ of error to secure a reversal, because, he says, a court should not have decreed that if the premises were not redeemed in accordance with the decree, the complainant should be barred and foreclosed from all equity of redemption. Plaintiff in error contends that this amounts to a strict foreclosure, and that in lieu of this provision the decree should have provided that if the amount due was not paid, the real estate should be sold in order to pay the amount, subject to

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complainant's right to redeem in equity. In support of this contention plaintiff in error cites Sheldon v. Fallstrom, 85 Ill. 511; Kretzer v. Smith, 89 Ill. 341; Smith v. Milliken, 90 Ill. 111; Smith v. Shewalter, 85 Ill. 134; Carpenter v. Plank, 108 Ill. 82.

The contention is a novel one in view of the pleadings. The complainant obtained a decree, which we must presume was based upon the evidence, which was in harmony with the theory of the bill and the relief prayed for. He specifically stated in his bill that he was ready and willing to pay such sums as might be found due, and does not now deny that the sum so found to be due is correct. The complainant filed the bill and defendant did not file any cross-bill nor seek affirmative relief. The cases cited by complainant hardly sustain the point for which he contends. In Sheldon v. Fallstrom, supra, the opinion was filed at the September term of the Supreme Court, 1870. In that case a bill had been brought to foreclose a mortgage, and it was there held error to decree a strict foreclosure, where it did not appear that the mortgagor was insolvent or that the mortgaged premises were of insufficient value to satisfy the debt. Kretzer v. Smith, supra, was a pure bill to redeem and the question raised here was not in any way involved or discussed there. Smith v. Shewalter, supra, was a case where a party, taking a deed, absolute on its face but in fact as security, having conveyed the title to a third party was held liable inasmuch as the original grantor. In Carpenter v. Plank, supra, the complainant filed a bill to redeem, and the defendant filed a cross-bill to foreclose, and the decree entered granted relief under both bill and cross-bill. It was there held that since foreclosure was granted on the cross-bill, the right of redemption of the complainant should have been preserved by the decree. The court said:

"The ordinary decree on allowing parties to redeem from a mortgage, is that the complainant be allowed to redeem the premises upon payment of the sum found to be due, within a reasonable time to be fixed therein, together with costs, and directing the defendant to discharge the mortgage or to convey the property to the complainant, if the defendant fails to do so instead of a mortgage as security on the payment of the money, and that in default of such payment within the time specified, the bill be dismissed. (*Pecker v. Fallon*, 100 Ill., 404; *Walsh v. Brown*, 106 id., 418; *Chicago & Calumet Milling Co. v. Healy*, 141 id., 408; *Brown v. Jones*, 190 id., 177 id., 464; *Harney v. May*, 50 Ill. 170.) But this is not merely a bill to redeem, it is also a bill to foreclose. While the original bill of the appellants seeks redemption, the cross-bill of the appellee seeks a foreclosure of the master's deed, regarded as a mortgage for the security of the title indebtedness.

The cause came on to be heard upon the making of the final decree, and relief was granted, not merely upon the original bill, but upon the cross-bill also. As the main relief granted in the foreclosure of a mortgage, the court below should have ordered a sale of the property, so as to permit the appellants to redeem the same in accordance with the provisions of the statute."

Scott v. Miller, supra, was a case where Miller had in 1864 taken title to certain lands under a direct foreclosure, and made valuable improvements thereon. Scott, the defendant, in the foreclosure proceedings, and holder of the legal title, appeared within three years, as under the Chancery statute he had a right to do, he having been served only by publication, and answered the original bill. He also filed a cross-bill to which Miller was made defendant. The court decreed that Scott might redeem by paying the amount of the mortgage debt and the value of the improvements estimated at \$12,000, and that in default of redemption the premises should be sold. The principal question in the case was whether Miller was entitled to receive pay for the improvements which he had made. The court held that he was, but also held that he had no claim on Scott's title to the lands other than the lien of the mortgage; that the court should have ascertained the value of the land independently of the improvements, and if it did not exceed the amount of the notes held by complainants when they filed their bill, then he should be per-

mitted to redeem in 90 days by paying the debt, improvements, taxes and costs; that if the land did not equal in value the amount of the debt, a decree of sale would be useless and should not be made. On the other hand, if the value of the improved land should exceed the debt, that a decree of sale should be made instead of a strict foreclosure.

The bill in the instant case does not allege that the premises are more valuable than the amount of the indebtedness; it is not a bill to foreclose, and it is not framed on that theory. Indeed the complainant has no mortgage to foreclose. The bill was primarily one to have a trust declared, and for leave to redeem from the strict foreclosure. It alleged that the complainant was willing to pay.

The decree of sale with the privilege to redeem would be inconsistent with that offer, and inconsistent with the theory on which the bill was brought. Having obtained what his bill asked for, a decree in conformity with its allegations and prayer for relief, complainant now appeals and asks that this decree be reversed. We do not think his contention can be sustained. In Exler v. Hillenburg, 166 Ill., 437, the Supreme court in considering a decree entered on a bill brought to redeem, said:

"What is a reasonable time in which to redeem ~~must~~ rests in the sound discretion of the court."

And again in Redman v. Quirk, 217 Ill., 162, where a junior mortgagee brought a bill to redeem from the foreclosure of a senior mortgage, the court said:

"The time in which the redemption shall be made rests in the discretion of the court."

But defendant has not asked that his mortgage be foreclosed. Complainant elected to bring a bill in which he alleged his willingness to pay the indebtedness secured by the mortgage. He asked the legal benefits which law and equity give, only upon

the condition that he is ready and willing to pay. Having obtained these benefits, he now also seeks relief inconsistent with his offer to pay. He cannot "blow hot and cold" at the same time. He is not entitled to a decree based on the double theory that he is ready and willing to pay and that he is not ready and willing to pay.

The foreclosure of the mortgage given by complainant to defendant is not involved in this proceeding, but there is language in the decree which may possibly be construed to mean that it is involved. To prevent any misunderstanding we think the phrase "under this decree" should be inserted in the last sentence of the decree after the words "and claim." That sentence will then read: "That if the premises are not redeemed in accordance with this decree, the complainant be forever barred and foreclosed from all equity of redemption and claim under this decree of, in and to said premises, and every part and parcel thereof which shall not have been redeemed."

As modified the decree will be affirmed.

AFFIRMED AS MODIFIED.

Dever, P. J., and McNurely, J., concur.

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TOM PETRAKOS,
Defendant in Error,

vs.

JOHN L. BANTA, J. D.
VOUMVAKIS and E. P.
METROPOLIS,
Plaintiffs in Error.

226 I.A. 636

APPEAL TO SUPERIOR COURT OF

COOK COUNTY.

OPINION ON PETITION FOR REHEARING

BY MR. JUSTICE HATCHETT.

The defendant in error, who was plaintiff in the trial court, on March 10, 1921, sued defendants, who are plaintiffs in error here. Summons was returnable to the April term of court 1921. March 17, 1921, defendants filed their appearance by their attorneys. The declaration was not filed by the plaintiff until April 20, 1921. It alleged that on August 21, 1920, the defendants became endorser on a promissory note for the sum of \$3,200 due November 21, 1920, with interest at the rate of 7 per cent. per annum after maturity; that plaintiff was the owner of the note, which was due and unpaid, and on November 21, 1920, during bank hours, the note was presented by plaintiff to defendants, but that it was not accepted and was not paid. It alleged that protest was duly made, and the makers and endorser given due notice of the non-payment.

Other counts of the declaration alleged the waiver by defendants of presentment of the note. Nine counts in all were included in the declaration. Attached thereto was a copy of the instrument sued on, and of the account, and an affidavit of the agent for the plaintiff, setting up the nature of the claim but omitting to state what amount, if any, was claimed to be due.

At the trial term on May 5, 1921, the default of defendants was taken for want of a plea, and judgment entered for

the full amount of the plaintiff's claim, amounting to the sum of \$5,502.04. June 27 thereafter, the term of court having expired, defendants entered a motion in writing to vacate the judgment. August 6, 1931, this motion was denied. Appeal was prayed and allowed but apparently not perfected, and thereafter this writ of error was sued out.

The motion to vacate the judgment was supported by certain affidavits, which set up in substance that neither the defendants nor their attorneys had any notice of the entry of the default and judgment until after the expiration of the term at which the judgment was entered; that they had a meritorious defense to the action in that they were individual endorser of the note sued on, and that it therefore became necessary that the note should be presented to the makers at the time of maturity and at the place where the same was made payable, and that the defendants should be given notice of non-payment, as required by law; that the note was not presented at that time, nor notice given as required by law. The affidavit specifically denied that defendants had waived their rights in any way.

Facts were also set up tending to show that defendants had employed a firm of attorneys to defend the suit, who had filed an appearance; that the defense of the suit was placed in charge of a member of this firm, who thereafter, on April 3, 1931, died; that the defense had then been turned over to another attorney, who represented that he was employed to defend the case, and upon such representation the matter was turned over to him, he being then informed of the fact that the declaration of the plaintiff had not yet been filed; that he failed to file the plea, and that no notice was given to defendants or their agents prior to the order of default and entry of judgment, and no notice was served upon their attorneys of record.

Defendants also set up in support of the motion rule 20 of the Superior court of Cook County, which is as follows:

"No motion will be heard or order made in any case, without notice to the opposite party, where the appearance of said party has been entered, except where the party is in default or when the cause is reached on the call of the trial calendar."

The defendants further offered to show that the default and judgment entered were taken and entered before the case was reached for trial in its regular order, and without having been placed on the trial calendar.

It is urged by the defendants that the trial court erred in refusing to set aside the default and judgment. This contention is made on the theory that although the term at which the judgment was entered had expired, nevertheless upon the showing made and by reason of the provisions of section 30 of the Practice Act, Cahill's Illinois Statutes, 1921, page 5854, the defendants were entitled to have the errors of fact set up in the affidavits corrected.

In the first place, we think it is apparent that plaintiff is not entitled to claim the benefits of the provisions of section 35 of the Practice Act, Cahill's Illinois Statutes, 1921, page 5876, which provides in substance that if the plaintiff upon any suit upon a contract, express or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand and the amount due him from the defendant, after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment as in case of default, unless the defendant, his agent or his attorney, shall file with his plea an affidavit stating that he verily believes defendant has a good defense upon the merits to the whole or a portion of plaintiff's demands.

This affidavit, it has been held, is in the nature of a pleading. Reese v. Penfield, 87 Ill. 38. It is therefore essential that the affidavit state the amount due, and the omission to state such amount is, we think, fatal to the affidavit. Without such a statement in the affidavit, we think plaintiff was not entitled to the benefits of the statute, and damages could not be assessed without taking evidence.

However, the judgment order itself recites that the damages were assessed "after hearing all the allegations and proofs submitted herein by the plaintiff," and we think that this statement of the judgment could not be contradicted by affidavits submitted after the term had expired. National Insurance Co. v. Chamber of Commerce, 89 Ill., 22; Rains v. Romer, 87 Ill., 637. But the affidavits in support of the motion set up facts which, being contradicted, we must assume to be true, and which, if true, show that no notice was given of the entry of the default, of the assessment of damages or taking of evidence. In the absence of an affidavit of merits - and there was no affidavit of merits here - the evidence ought not to have been taken, the default entered nor the damages assessed without such notice.

The affidavits also show that the cause was tried without being placed on any calendar, and that the trial was had and the judgment entered out of the regular order. The plaintiff did not take issue on these facts, but seems to have submitted the motion to the court on the proposition of law whether these facts were sufficient to justify an order setting aside the judgment after the expiration of the term. As the term had expired, the defendants' motion was necessarily based on section 88 of the Practice Act, supra, which in substance provides that errors of fact may be corrected by the trial court after the judgment term on a motion

substituted for the common law writ of error quare nulla. It was held in Mitchell v. King, 187 Ill., 482, that while this statute abolishes the writ, the essentials of the proceeding remain the same.

The errors of fact which may be corrected are also limited to the same and similar errors of fact which might be corrected at common law by the use of the writ. Smith v. Gould v. Felsing, 30 Ill. App. 242. In Yacovitz v. Eastern Electric Co., 213 Ill., 326, this court said:

"Only errors of fact, not apparent upon the face of the record, may be thus corrected, and such facts as it would be presumed if the court had cognizance of, it would not have rendered the judgment."

The errors of fact enumerated in the affidavits submitted in support of the motion are not apparent on the record. It does affirmatively appear from the record that the affidavit of merits was substantially defective, and that plaintiff is not entitled to the benefits of the section 85 error, and the affidavits disclose what the record does not contradict in any way - that the case was heard without notice and out of its regular order, and without being placed upon the trial calendar.

It is impossible to believe that if the court had cognizance of these facts it would have entered the judgment. As a result thereof, the defendants have been deprived of the elementary right to be present when the suit against them came on for trial. We think the motion should have been allowed, and the order denying it is reversed and the cause remanded.

REVERSED AND REMANDED.

McMurely, P. J., and Dever, J., concur.

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103 - 27053

TOM PETRAKOS,
Defendant in Error.

vs.

JOHN L. BANTA, J. D. VOUMVAKIS
and E. P. PETRONIOULOS,
Plaintiffs in Error.

2261. 636

SHOW TO

SUPERIOR COURT.

JOSE COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case the defendant in error, who was plaintiff below, on March 10, 1921, filed a proceipe and sued out a summons against defendants, who are plaintiffs in error here, returnable to the April term of court, 1921. The summons was duly served, and on March 17, 1921, defendants filed their answerance by their attorneys. The declaration was filed by the plaintiff in the case April 20, 1921. This declaration alleged that on August 21, 1920, the defendants became endorsers on a promissory note for the sum of \$3,200, due November 21, 1920, with interest at the rate of seven per cent per annum after maturity; that plaintiff was the owner of the note; that on November 21, 1920, during bank hours, the note was presented by plaintiff to defendants, but that it was not accepted, was not paid, was thereupon duly protested, and the makers and the endorsers given due notice of its non-payment.

In other counts it was alleged that defendants waived presentment of the note. Nine counts in all were included in the declaration and there were attached thereto a copy of the statement sued on and of the account, and an affidavit of the agent for the plaintiff, but the affidavit did not state what amount, if any, was due. On May 5th, thereafter, it was ordered that the default of the defendants should be taken for want of a plea, "therefore the plaintiff ought to have and recover of and from the defendants his damages sustained ^{herein} by reason of the premises, and thereupon

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reference is had to the court to assess the plaintiff's damages herein; and the court saw here, after hearing all the allegations and proofs submitted herein by the plaintiff, and being fully advised in the premises, assess said plaintiff's damages against the defendants to the sum of three thousand three hundred two dollars and four cents." Judgment was thereupon entered for that amount.

On June 27th thereafter the defendants entered their motion to vacate this judgment, which motion on August 5, 1931, was over-ruled by the court. Appeal was prayed and allowed, but apparently not perfected, and thereafter, this writ of error was sued out. The motion to vacate the judgment was supported by certain affidavits which were made a part of the record by bill of exceptions. These affidavits are to the effect that neither the defendants nor their attorneys had any notice of the entry of the default and judgment, until execution was taken out under said judgment; that they have a meritorious defense to the action of the plaintiff, in that they are individual endorsers of the note sued on, and that it therefore became necessary that the note should be presented to the makers at the time of maturity and at the place where the same was made payable, and that the defendants should be given notice as required by law of non-payment; that neither these things nor any one of them was done, and that defendants had at no time waived their rights in this respect.

It is further made to appear by one of the affidavits, that a firm of attorneys was employed to defend the cause, and filed its appearance; that the matter was placed in charge of one of the members of the firm who died thereafter on April 3, 1931, and thereafter another attorney appeared at their office and stated that he was authorized by the defendants to handle the matter, and that upon this representation it was turned over to him; that he (this attorney) was notified that the appearance of the defendants

had been filed, but that the declaration of the plaintiff had not yet been filed; that he failed to file the plea of the defendants to the declaration; that no notice was given the defendants or their agents prior to the order of default and entry of judgment and no notice served upon the attorneys of record.

The defendants also offered to show that at the time the judgment was entered, no evidence in behalf of the plaintiff in the cause was offered. The defendants, also, upon the hearing of the motion introduced in evidence rule 30 of the Superior Court of Cook County, which is as follows:

"The motion will be heard or order made in any case, without notice to the opposite party, where the appearance of said party has been entered, except where the party is in default, or when a cause is reached on the call of the trial calendar."

Defendants further offered to show the default and judgment entered on May 3, 1921, were taken and entered before the cause was reached for trial in said court in its regular order, and without the cause having been placed on the trial calendar.

Many questions have been argued in the briefs as to whether the court erred in refusing to set aside the judgment after the term at which it was entered had expired. These it will be unnecessary to consider, as the writ of error brings up the whole record, and makes it possible to raise the question whether the judgment itself is free from error. We think it is not. Section 55 of the Practice Act, Cahill's Ill. Statutes, 1921, p. 2678, provides in substance that if the plaintiff upon any suit upon a contract, express or implied, for the payment of money, shall file with his declaration an affidavit showing the nature of his demand and the amount due him from the defendant, after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment as in case of default, unless the defendant or his agent or attorney, shall file with his plea, an affidavit stating that he verily believes defendant has a good defense to said suit upon

the merits, to the whole or a portion of the plaintiff's demand, etc.

As we understand the law it was the purpose of the Legislature in enacting this statute to expedite the hearing of any case to which there was no substantial defense, and to permit the assessment of damages in such cases without taking evidence. The affidavit required was substituted for the evidence which otherwise it would have been necessary to take. This affidavit, it has been held, is in the nature of a pleading. McFarris v. Fenfield, 87 Ill. 33. It is essential that the affidavit shall state the amount due, and the omission to state such an amount is, we think, fatal to the affidavit. Without such statement in the affidavit, we think plaintiff was not entitled to the benefits of the statute, and damages could not be assessed in the absence of such an affidavit without taking evidence, and this evidence could not be taken at any time other than on the regular call of the cause on the calendar (while, as here, defendant's appearance was on file) without notice, as required by the rule of court. The court, therefore, erred in hearing the cause without notice and in entering judgment without evidence. For these reasons the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Dever, P. J., and McMurely, J., concur.

THE HISTORY OF THE WORLD IN A SERIES OF TEN VOLUMES

1811

It is necessary to say a few words of the manner in which this history is written. It is written in a style which is at once simple and elegant, and which is adapted to the understanding of all classes of readers. The author has endeavored to present the facts of history in a clear and concise manner, and to avoid all unnecessary details. He has also endeavored to present the events of history in a logical and connected manner, so that the reader may be able to see the causes and effects of the various events. The history is written in a style which is at once simple and elegant, and which is adapted to the understanding of all classes of readers. The author has endeavored to present the facts of history in a clear and concise manner, and to avoid all unnecessary details. He has also endeavored to present the events of history in a logical and connected manner, so that the reader may be able to see the causes and effects of the various events.

Printed by J. G. and J. B. Smith, 1811

304 - 27161

THOMAS ROBIN,
Appellee,

vs.

NATIONAL FIRE INSURANCE
COMPANY OF HARTFORD, CONN.,
a Corporation,
Appellant.

226 I.A. 636

OFFICE OF THE CLERK OF THE COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse a judgment for the sum of \$2,170 entered in favor of the plaintiff upon the finding of the court. The plaintiff sued on an insurance policy executed and delivered by the defendant, which purported to insure plaintiff against the loss of an automobile by theft or robbery. The contract of insurance was set up in these words is the statement of claim.

The affidavit of merits denied that the automobile was stolen within the meaning of the policy, and averred that requirements and conditions precedent of the policy as to notice and proof of loss had not been complied with by the plaintiff. Defendant appellant now contends that the evidence as to the theft and as to notice and proof of loss is insufficient to sustain the finding of the court and also insufficient to maintain the amount of damages assessed by the court.

The policy provides that "The National Fire Insurance Company of Hartford, Conn., in consideration of the sum of \$2,170 and the premium hereafter mentioned does insure against theft, robbery or pilferage, excepting by any person or persons in the insured's household or employment whether the theft, robbery or pilferage occur during the hours of such service or employment or not, and excepting also the wrongful conversion or secreted by a mortgagor or vendee in possession under mortgage, conditional sale

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or lease agreement, and excepting in any case other than in case of total loss of the automobile described therein, the theft, robbery or pilferage of tools or repair equipment...".

The defendant says that the plaintiff failed to prove that he sustained a loss of the character for which defendant contracted to indemnify him, and specifies that the proof was deficient in that it failed to establish that the automobile was stolen by someone other than persons in the insured's household or in his employ. Plaintiff says that the proof offered cannot be held to establish that material fact, except by basing a presumption upon a presumption, which is not proper proof, citing Wicks Accident Ins. v. Gerlach, 163 Ill., 525; London v. Schoenfeld, 214 Ill., 526.

The evidence for plaintiff tended to show that he lived at 1805 Madison street, in Chicago; that for about fourteen years he had been in the saloon business; that on September 4, 1919, (at which time it was claimed the automobile was stolen) he was operating a saloon at 1664 West Madison street; that he drove a car to his place of business, and that between eight o'clock and nine thirty he missed the automobile. He says that he went inside the saloon at about eight thirty and about half an hour afterward locked out through the side door and saw that the car was gone; that he went out through the door on the street and over to the garage in which he kept his car; that he thought somebody might have taken it as a joke; that he then called up the Warren Avenue police and the next morning called up the insurance people.

He says that at the time the automobile was outside his saloon he believes it was locked with a Yale lock and that he had the keys of the car; that "no one had access to it in my employ, and the car was not taken from that place with my consent or permission."

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control the money supply and has therefore had to resort to printing money.

The second is the fact that the government has not been able to control
the interest rate and has therefore had to resort to printing money.

The third is the fact that the government has not been able to control
the exchange rate and has therefore had to resort to printing money.

The fourth is the fact that the government has not been able to control
the balance of payments and has therefore had to resort to printing money.

The fifth is the fact that the government has not been able to control
the foreign trade and has therefore had to resort to printing money.

The sixth is the fact that the government has not been able to control
the foreign investment and has therefore had to resort to printing money.

The seventh is the fact that the government has not been able to control
the foreign capital and has therefore had to resort to printing money.

The eighth is the fact that the government has not been able to control
the foreign assets and has therefore had to resort to printing money.

The ninth is the fact that the government has not been able to control
the foreign liabilities and has therefore had to resort to printing money.

The tenth is the fact that the government has not been able to control
the foreign reserves and has therefore had to resort to printing money.

The eleventh is the fact that the government has not been able to control
the foreign debt and has therefore had to resort to printing money.

The twelfth is the fact that the government has not been able to control
the foreign equity and has therefore had to resort to printing money.

The thirteenth is the fact that the government has not been able to control
the foreign income and has therefore had to resort to printing money.

The fourteenth is the fact that the government has not been able to control
the foreign expenditure and has therefore had to resort to printing money.

On cross-examination he said that he had an employe at that time whose name was Hiltedell, but that Hiltedell did not have any keys to the automobile or to the lock. On re-direct examination he says that Hiltedell was one of the boys that worked for him in his saloon; that he was not his chauffeur; that he worked there as a waiter and was not paid to drive the car; that on the night of September 8, 1917, Hiltedell was working in the saloon and that he was in the saloon during the time when plaintiff missed the car. Plaintiff also said that he had 37 employes working for him in the saloon and the cabaret which was running in connection with it; that the monogram on the car was not T. H., but T. T.; that he was commonly known as Tommy Thomas, which was his professional name under which he ran the saloon and cabaret; that Hiltedell was the only one of his employes who took care of the car; that he washed it and cleaned it and took care of it in the garage, and besides that worked in the cabaret.

Plaintiff was afterwards called as a witness by the defendant under section 33 of the Municipal Court act, and testified that an employe named Hirsch might have ridden in his automobile sometimes, but he did not have anything to do with it; that plaintiff did not know where Hiltedell was at the present time, and had not even seen him for a year and a half or more, and had not sent any word to him about his appearance as a witness on the trial. This evidence of plaintiff is not contradicted in any way. The defendant offered no evidence. Appellant cites the case of James City Rental Auto Co. v. Old Colony Ins. Co., 174 N. H. 181, and says this evidence is insufficient to sustain the finding that the automobile was stolen by some one not in the employment, etc., of plaintiff. But we think (assuming that the evidence here is not of greater weight than was the evidence submitted in the case cited) it hardly sustains the point made. In that case there was

a trial by jury and the court instructed the jury to find for the plaintiff on evidence somewhat similar to that which the plaintiff gives here. The Appellate Tribunal held this was error, and that the issues should have been submitted to the jury, which might have found either for or against the plaintiff. In the instant case the finding of the court takes the place of the verdict of the jury, and the question before us is whether the finding is so clearly and manifestly against the weight of the evidence that it ought to be set aside. We do not think we can so find, nor that the proof that the automobile was stolen by some one other than plaintiff's employee rests upon a presumption, based upon another presumption.

As to the contention of the appellant that the plaintiff failed to furnish sworn proof of loss to defendant, which by the terms of the policy was made a condition precedent to recovery, the evidence shows that on September 9th the defendant wrote to plaintiff stating that it enclosed a report of total theft blank, which it asked him to fill out with the necessary information and sign an affidavit before a notary public and return as soon as possible. He filled out this blank and swore to it on the 10th day of September, 1919, and returned it to the defendant, who retained the same without objection. We think that further proofs of loss were thereby waived. Atlantis Ins. Co. v. Wright, 22 Ill., 462; Phoenix Ins. Co. v. Belt Ry. Co. of Chicago, 182 Ill., 35; McConner v. Maryland Motor Car Ins. Co., 287 Ill., 294.

As to the contention that the proof did not sustain the amount of damages, it seems that the policy in question specifically states that the agreed value of the automobile is \$2,000. A policy with the same provision was construed by this

court in O'Connor v. Maryland Motor Car Co., 111 Ill. App. 849; and the judgment of this court holding the valuation of the contract conclusive was affirmed by the Supreme Court in 207 Ill., 204. We think under the facts and in view of the law as there stated, the court did not err in assessment of damages.

The judgment is affirmed.

AFFIRMED.

McBurely, P. J., and Bever, J., concur.

CHRISTIAN CHANCY,
Appellee,

vs.

EUGENE MARSLAWSKY,
Appellant.

226 I.A. 637

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE RATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant below from a judgment in favor of the plaintiff in the sum of \$2,500, entered upon the verdict of a jury, motions for a new trial and in arrest of judgment having been over-ruled. The action was in trespass on the case on promises. The declaration is in three counts. In the first count plaintiff alleges that on August 11, 1910, "at the county aforesaid," the defendant was indebted to the plaintiff in the sum of \$2,500 for money received for and to the use of the plaintiff and at his request, and that being so indebted the defendant promised to pay when requested, which he had refused to do. The second count alleged that at the same time and place the defendant was indebted for the same amount, for money lent and advanced at his request, and that, being there indebted, he promised to pay. In the third count it is alleged that at the same time and place the plaintiff paid and advanced to the defendant, at his request, the sum of \$2,500, which the defendant agreed to repay; "nevertheless, defendant, not regarding his said several promises, but contriving to deceive and defraud the plaintiff in this behalf, has not paid the said sum of money with interest thereon, or any part thereof, to the plaintiff, but has wholly neglected and refused and still does neglect and refuse so to do, to the damage of the plaintiff in the sum of \$2,500, and therefore he brings his suit."

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Figure 1.1

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States.

THE STATE OF TEXAS, COUNTY OF DALLAS, ss. I, the undersigned, a Notary Public in and for said State and County, do hereby certify that the foregoing is a true and correct copy of the original of the same, as the same appears from the records of said County.

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1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

1. The first part of the report is a general introduction to the project, which includes a statement of the problem, the objectives of the study, and a brief description of the methodology used.

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To the declaration is attached an affidavit of plaintiff which alleges that there is due to him, after allowing all deductions and effects, the sum of \$3,354.18. To this declaration the defendant filed a plea of non-assessment and an affidavit stating that his defense was, "That the plaintiff did not lend any money to this defendant, and that this defendant did not at any time receive any money belonging to or for the use of the plaintiff."

There is little conflict in the evidence, which tends to show the following facts: The plaintiff in May and August, 1919, lived at 7659 Greenwood Avenue, Chicago, and was a laborer for the Illinois Steel Company, although at that particular time doing what he calls a "gardening business" for Kraus Bros. He is a native of Russian Poland, and his wife and family were there. He had been in this country about six years, and at this time desired to return to his native country, which had then passed under the control of the Republic of Poland. The defendant, Braslawsky, was a broker conducting a business at No. 160 North Wells street in Chicago, and held licenses so to do from the United States Government and the City of Chicago. He seems to have carried on at least a part of his business at No. 160 North Wells street under the name of "Russian American Bureau." At the same place was the main office of a private bank conducted by him under the name of the "Russian Bank in Chicago, Braslawsky & Co., Bankers." He also dealt in foreign exchange, and in connection with that business employed one Solomon Jenner.

May 8, 1919, plaintiff went to the office at Wells street for the purpose of securing a passport, and at that time he paid to the defendant \$3.00, for which defendant gave him a receipt, "Account of deposit for transportation to Poland," signed "Russian American Bureau, E. Braslawsky, per T. T." May 24, 1919, plaintiff again visited the defendant's place of business and at

that time paid \$9.00, for which he received a receipt stating that it was for "account of affidavits and identification proof." This receipt also was signed "Russian American Bureau, V. Braslawsky, per T. W." and was stamped "Russian American Bureau, PAID."

October 30, 1919, plaintiff made out an application to the Consulate General of the Republic of Poland at New York for a passport, and this application is attested by the defendant, with Solomon Jenner, as witnesses, and purports to be acknowledged before Sophia Wyszczenska, a notary public, who was then in the employ of the defendant. There was considerable delay in securing the passport.

Plaintiff had on deposit with the Stony Island Trust & Savings Bank in Chicago the sum of \$2,500. August 11, 1919, as he testifies, at the request of the defendant, and as is admitted, he went to the Stony Island bank accompanied by Solomon Jenner, and a cashier's check was there drawn against his account, payable to the order of Braslawsky & Company, for the sum of \$2,500, and this check was delivered to Braslawsky & Co., who endorsed the same to the order of the Continental & Commercial National Bank, and the same was paid by the Stony Island Bank on August 13, 1919. On the same date defendant delivered to plaintiff book No. 9039, upon the back of which appears the statement, "Russian Bank in Chicago, Braslawsky & Co., Bankers, Main office 154 North Wells Street. Branch 706 West 12th street, Chicago, Illinois." On the inner page is the following: "Christian Chancy Book 9039, Braslawsky & Co., Bankers. All our deposits are made subject to the laws of this Bank.

Date	Withdrawals	Deposits	Balance
August 11th, 1919.	Paid	-----16,600	16,600."

This book was kept by plaintiff and produced by him upon the trial of the cause.

Plaintiff testifies that at one time when he went to the office of defendant, he inquired about the passport; that defendant said he could get it maybe in a couple of days or a couple of weeks, and said further, "You had better change your money, money goes up." Plaintiff testifies, "I did not have any idea at all about changing the money before that time. He brought up the question of money when he said, 'Better change your money.' I said, 'I got no money with me, I cannot change it.' I told him my money was in the Stony Island Trust & Savings Bank. He said, 'I will send my man along with you to the bank and you come back with him.' He sent a man with me to my house to get my check book and I took a check out of the book.*** That is all the conversation I had with Mr. Braslawsky at that time." Plaintiff further says that he delivered the check to Mr. Braslawsky's man, who took it along; that he, plaintiff, then went with him to Braslawsky's office and that he had no conversation with Braslawsky at his office at that time; that after a couple of months he again went to see about the passport, and was told that it had not yet come, that he would have to wait a year before he could get it; that he then asked about the money and said, "The money is no good any more," to which defendant replied, "The money is all right, the money will be all right after a couple of years."

Plaintiff says that he again went to defendant after a couple of months and asked him about the passport; that defendant said he did not get it, and plaintiff says that he again told him about the money, that the money was no good because "the Russian country was broke," and defendant said, "That is all right, you did right to change it;" that a couple of months later he again inquired about the passport and defendant said, "You got it, you got it." Plaintiff says that at that time he told the defendant

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"to give me different money, I wanted American money. He said, 'I cannot give you any more than \$250,'¹⁰ and that at no time did he give to plaintiff or show plaintiff any rubles.

On cross-examination plaintiff admitted that he had asked defendant about German marks, how much he would exchange for German marks; he admitted that he speaks and reads German,

Miss Wysozesnuka for the defendant testified to a conversation which plaintiff had with her, in which he said, "'Do you think I will be able to use Russian rubles there?' I said, 'Yes, certainly you will be able to use Russian rubles there, because for a long time they will be in circulation in that province.'" He said, "Then I will certainly have to change to rubles."

Jesner says that he went with plaintiff to the Stony Island bank; that plaintiff sent a withdrawal slip through and that, as they came back, plaintiff told him he had purchased some rubles "from us," told him the rate he had paid, and asked the opinion of the witness as to whether he had paid too much, to which witness replied, "It was our selling rate at that time."

Defendant says that plaintiff told him that he wanted to buy rubles and asked if he could have the rubles right away; that he told him that he could have them at any time that he wanted them, and asked him whether he wanted to purchase the rubles in August when he was not going, to which the plaintiff replied "yes," and he also says that plaintiff said to him, "I better leave the rubles for safe keeping with you until I am ready to go, then I have my pass book, then I will call at your office and take my Russian rubles;" so I was agreeable, and said, 'You can leave it for safe keeping,' and gave him a savings book for this purpose, that we have on his account 18,000 rubles. Then I sent my man out. That transaction, that conversation which I

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have just related concerned the transaction following August 11th, when this check was brought back by Dr. Jenner."

Identifying a pass book for 16,500 rubles produced by plaintiff, defendant said, "The book is a pass book by and from Braslawsky & Company to Christian Chaney. At the time when the money was collected, we had issued him a book for 16,500 rubles, and told him any time he wants he can always have the money."

At the close of all the evidence defendant made a motion that the jury be instructed to find for the defendant, which motion was over-ruled and the verdict returned upon which judgment was entered, a motion in arrest of judgment having been over-ruled.

Defendant urges that the court erred in denying the motion in arrest of judgment, because of a misnomer of the defendant. The declaration as filed complained of Vlavimir Braslawsky, doing business as Braslawsky & Company, and summons issued against defendant by that name, and the return of the sheriff corresponds with the summons. Defendant filed a plea entitled as follows: "Eugene Braslawsky, doing business as Braslawsky & Company, erroneously sued as Vlavimir Braslawsky vs. Christian Chaney." This plea states, "And the defendant Eugene Braslawsky, ***** his attorney, comes," etc. After the entry of the judgment, on motion of the plaintiff, leave was given to amend the declaration on its face by substituting "Eugene Braslawsky" in place of "Vlavimir Braslawsky," as party defendant, and the judgment was amended to correspond with the declaration in that respect. We do not think there is any merit in this contention of appellant. In the first place, because the defect was waived by a plea to the merits. 31 Cyc. 737; and in the second place, because the judgment was amendable in this respect either during or after the term. Brink v. Schroyer, 13 Ill., 416.

Appellant further argues that on the undisputed evi-

dence the motion for a directed verdict should have been allowed, but we think there was some evidence which required the case to be submitted to the jury.

It is not argued that the jury was erroneously instructed, nor that there was any error on the rulings of the court on the admission or exclusion of evidence, but it is argued that as the verdict was against the manifest preponderance of the evidence, it should have been set aside and a new trial granted. It must be admitted that the evidence in the record as to the actual transaction is meagre and unsatisfactory.

Appellee suggests that the judgment may be justified on the theory that the actual agreement was that the exchange of plaintiff's United States money for rubles would be consummated only in case plaintiff's passport was obtained. That might be a reasonable and probable construction of the whole transaction, as defendant would have no use for the rubles unless the passport was obtained. This theory is also consistent with the statement of the defendant that he told plaintiff he could have his money "any time."

Appellee further suggests that the verdict may be justified under the evidence upon the theory that defendant was acting in a fiduciary capacity and as agent for plaintiff. There is some evidence indicating that the plaintiff had imperfect knowledge of our language and customs, although the evidence is not so clear as it might be upon that point. He undoubtedly employed defendant as his agent with reference to the journey he was about to make. The evidence also tends to show that he relied on the statements of defendant and defendant's employees in this transaction. It is also fair to infer from the evidence that the defendant had full knowledge in all these matters, and the evidence tends to show that while acting as plaintiff's agent

THESE TWO PRINCIPLES ARE THE ONLY ONES WHICH
CAN BE APPLIED TO THE STUDY OF THE HISTORY
OF THE HUMAN MIND.

THE FIRST PRINCIPLE IS THAT THE MIND IS
A PRODUCT OF THE PHYSICAL WORLD, AND
THAT IT IS INFLUENCED BY THE PHYSICAL
WORLD IN EVERY WAY. THE SECOND PRINCIPLE
IS THAT THE MIND IS A PRODUCT OF THE
SOCIAL WORLD, AND THAT IT IS INFLUENCED
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he put over a transaction with plaintiff whereby he secured \$8,500 for that which became worthless. But these and other theories, which there is some evidence tending to sustain, are wholly inconsistent with the statements which the witnesses for defendant testify plaintiff made in connection with the transaction, and which he was not called on in rebuttal to deny. This may have been an inadvertence, but we are obliged to decide the cause here upon the record; and with these statements sworn to by unimpeached witnesses and uncontradicted, we are obliged on the record to hold, with some reluctance, that the verdict is manifestly against the weight of the evidence. For this reason the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

McSurely, P. J., and Dever, J., concur.

The first thing I noticed when I stepped out of the car was the cold. It was a sharp, biting cold that seemed to penetrate my coat. I shivered as I walked towards the building, my hands tucked into my pockets. The air was thick with the scent of old stone and the distant hum of city traffic. I took a deep breath, trying to ignore the chill. The building was a grand, imposing structure with many windows, some of which were dark and others reflecting the pale light of the sky. I walked up the steps, my boots clicking on the stone. The door was open, and I stepped inside. The interior was dimly lit, with the light coming from a few small lamps. I looked around, trying to get my bearings. The room was large and empty, with a high ceiling and a floor of polished wood. I walked towards the back of the room, where I saw a door. I opened it and stepped out. The air was even colder here. I looked back at the building, then forward at the path ahead. I took a step, then another. The path led to a small, open area with a few trees. I stood there for a moment, looking at the building again. It seemed so distant now, so far away. I turned and walked away, my hands still in my pockets. The cold was still there, but it didn't seem so sharp anymore. I walked until I was out of sight of the building, then I stopped. I looked back one more time, then I turned and walked away. The path led to a small, open area with a few trees. I stood there for a moment, looking at the building again. It seemed so distant now, so far away. I turned and walked away, my hands still in my pockets. The cold was still there, but it didn't seem so sharp anymore. I walked until I was out of sight of the building, then I stopped. I looked back one more time, then I turned and walked away.

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239 - 27196

BEVA A. DEFFLER,
Appellant.

vs.

WILLIAM WADDELL,
JOHN BURKHALTER,
K. W. JACKSON and
THOMAS McCURDY,
Appellees.

226 I.A. 637

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case the appellant, who was plaintiff in the trial court, brought an action in forcible detainer to recover possession of certain premises situated in the City of Chicago and County of Cook. The defendants were appellees William Waddell, John Burkhalter, K. W. Jackson and Thomas McCurdy. The cause was tried by the court without a jury. The court found the defendants not guilty, denied plaintiff's motion for a new trial and in arrest of judgment, and entered judgment for defendants on the finding.

The action of the plaintiff was based on subdivision 6 of section 2, chapter 37 of the Statutes of Illinois, Cahill's Rev. Stat. 1921, p. 1321, which provides in substance that a plaintiff entitled to the possession of lands or tenements may recover the same when the lands or tenements have been conveyed by any grantor in possession or sold under the judgment or decree of any court in this State, or by virtue of any sale or any mortgage or deed of trust contained, and the grantor in possession or party to such judgment or decree or to such mortgage or deed of trust, after the expiration of the time of redemption, when redemption is allowed by law, refuses or neglects to surrender possession thereof after demand in writing by the person entitled thereto or his agent.

The facts in evidence are practically undisputed.

The defendant William Waddell was in possession of the premises through the other defendants, who were his tenants from month to month, and demand for possession was made upon all of them. The title to the premises was originally in James L. Clay and Sarah E. Clay. By a deed dated June 1, 1916, and recorded June 5, 1916, they (James L. and Sarah) purported to convey the premises in question to one Edward Clay, Jr. Thereafter on August 9, 1916, a judgment by confession was entered in the Circuit Court of Cook County, in favor of Neva A. Deffler and against said James L. Clay and Sarah E. Clay for the sum of \$5,306.86.

Edward Clay sold the property to the defendant Waddell. There seems to be some obscurity as to the exact date, but he made an initial payment of \$300 on the purchase price, which was \$3150, and also took possession. Other payments were thereafter made and an instrument purporting to be a deed from Edward Clay to William Waddell was recorded in the recorder's office of Cook County on August 22, 1916. On November 2, 1916, a creditor's bill was filed by complainant in the Superior Court of Cook County, which bill was based upon the judgment of August 9th. She made defendants thereto said James L. Clay, Sarah E. Clay and Edward Clay, Jr. A decree was entered on March 18, 1918, by which the deed from James L. Clay and Sarah E. Clay to Edward Clay was set aside, and it was further directed that the premises should be sold and execution issue on the judgment against James L. and Sarah E. Clay. The premises were sold under the execution, and the sheriff's deed was issued to the appellant.

The decree upon the creditor's bill does not refer to the purported deed to William Waddell, nor does it assume

The issue is whether the property is real estate.
The defendant claims that it is real estate and is entitled to the proceeds
thereof and other benefits, and that his interest is a fee simple,
in whole, and having the character of an estate in fee simple.
The title to the premises was originally in James L. Clay and
James H. Clay. By a deed dated June 1, 1811, and recorded June
2, 1811, they (James L. and James H.) conveyed to George the
premises in question to one William Wadell, Jr. Transferred on
August 2, 1811, a judgment by confession was entered in the
Circuit Court of Cook County, in favor of James L. Clay and
against said James L. Clay and James H. Clay for the sum of
\$1,000.00.
James Clay sold the property to the defendant and his
heirs to be held absolutely to the said wife, who is
said to have been a widow, and to her heirs, and to the heirs of
said wife, and also their posterity. Other persons were interested
made and an instrument purporting to be a deed from William Wadell
to William Wadell was recorded in the recorder's office of Cook
County on August 22, 1811. On November 7, 1811, a complaint
was filed by complainant in the Superior Court of Cook
County, which was based upon the judgment of said Court.
The said complaint was returned to James L. Clay, James H. Clay,
and James Clay, Jr. A decree was entered on March 12, 1812, by
which the said James L. Clay and James H. Clay were ordered
to pay the said wife, and it was further directed that the
said wife should be sold and execution issued on the judgment. Said James
L. and James H. Clay. The premises were sold under the
execution, and the proceeds of the sale were paid to the defendant.
The issue was then brought on for trial, and the court
in the foregoing case, in William Wadell, Jr. vs. James L. Clay,

to pass upon his rights or the rights of defendant's tenants holding under him.

The plaintiff objected to the introduction in evidence of the purported deed from Edward Clay, Jr. to William Waddell, but as the evidence shows that Waddell was in possession prior to the filing of the creditor's bill under a contract of purchase on which he had made substantial payments ^{we think} this was immaterial.

The appellant insists that upon introducing in evidence the judgment and the decree and showing a sale thereunder, and that the time for redemption from such sale had expired, and that demand in writing for possession was made upon the defendants and that they had refused to surrender the premises, a prima facie case was made out under the statute. To so construe the statute would require that we disregard the meaning of the phrase "or party to such judgment or decree." As we read the statute the demand is unavailing unless the party upon whom the demand is made is a party to the judgment or decree, otherwise, as appellee points out, the effect of the statute would be to make it possible that a person might be dispossessed of any land belonging to him, although there had been no proceeding by which the rights of the parties had been adjudicated.

Appellant says that if Edward Clay, Jr. had been in possession of the premises during this equitable proceeding, and had remained in possession after the sale of the premises, he could have been ousted therefrom in this action, and that the defendant Waddell and those holding under him stand in the shoes of Edward Clay, Jr., and are in no better or more favorable position than he would be if he were himself the party defendant. We do not think that this contention can be sustained for the reason that when James L. Clay and Sarah E.

to pass upon his rights or the rights of defendant's agents
without more.

The plaintiff objected to the introduction in evidence
of the proposed test from Edward King, Jr. as witness actually,
but in the absence of any other witness and in view of the fact
to the filing of the affidavit will under a contract of non-
we think
admission on which he had made substantial payment. This was in-
material.

The defendant insists that upon introduction in
evidence the judgment and the facts and showing a sale of the
land, and that the law of the jurisdiction from which said land
originated, and that demand in writing for possession was made upon
the defendant and that they had refused to surrender the
premises, a prima facie case was made out under the statute.
So as to the statute the statute would require that we disregard the
meaning of the statute for party to such judgment or decree.
As we read the statute the statute is unavailing unless the
party upon whom the demand is made is a party to the judgment
or decree, otherwise, as appears from the statute, the effect of the
statute would be to make it possible that a person might be
dispossessed of any land belonging to him, although there has
been no proceeding by which the rights of the parties had
been adjudicated.

Appellant says that if Edward King, Jr. had been
a possessor of the premises under this contract of purchase,
and had remained in possession after the sale of the premises,
he could have been ousted therefrom in this action, and that
the defendant himself and those claiming under him acted in the
absence of Edward King, Jr., and now in no better or worse
favorable position than he would be if he were himself the
party defendant. He does not think that this conclusion can be
reached for the reason that when James E. King and others

Clay conveyed the premises in question to Edward Clay on June 1, 1916, the judgment against the grantors had not been taken, and the grantee therefore took the title free and clear of the lien of the judgment. Union N. Bank v. Lang, 177 Ill. 174.

While it is true that that deed was afterwards set aside upon a finding by the chancery court that the same was made in fraud of the grantors' creditors, nevertheless, the title thus placed in Edward Clay had been by him conveyed to William Waddell prior to the entry of the decree, and that decree did not attempt to adjudicate William Waddell's rights in the premises.

The general rule is, undoubtedly, as stated in 2 Black on Judgments, p. 717, "It is a universal rule that all who are neither parties to a judgment nor privies to such parties, are wholly free from the estoppel of the judgment;" as was said in the Duchess of Kingston's case, 22 How St. Tr. p. 356. "What has been said at the bar is certainly true as a general principle, that a transaction between two parties in a judicial proceeding ought not to be binding upon a third, for it would be unjust to bind any person who could not be admitted to make a defense or to examine witnesses, or to appeal from a judgment he might think erroneous."

The same rule is also laid down in 23 Cyc. 1257, where the author says a judgment in an action respecting real property or title or rights thereto against a grantor of such property is binding on his grantors, provided the latter acquired his interest after the institution of the suit or after the judgment was rendered, but not where the rights of the grantee vested before the commencement of the action, unless he is made a party thereto.

Appellant relies upon two cases, Jackson v. Warren, 32 Ill. 331 and Rice v. Brown, 77 Ill. 549. Neither case, we think, sustains her contention. In Jackson v. Warren, this section of the

forcible entry and detainer statute is construed, and it is said that it is a remedial statute and should be construed in a liberal manner. But the point there decided was only that a purchaser pendente lite is bound by a decree. In Rice v. Brown, supra, it appeared that one Mills was indebted to a man named Brown, and executed certain trust deeds to secure the payment of his notes for that debt. The trust deeds gave power to Brown, in case of default, to sell these lands. Upon default, a suit in equity was begun and a decree was entered and the property sold. Rice was not made a party to the foreclosure proceedings. It was contended in that case that Rice was not bound by the decree, but the court held, that although not named as a defendant, he was bound by the decree because he was in possession under Mills, who was maker of the deeds of trust. There is a clear distinction between that case and this one. Rice there took his title subject to the lien of the mortgage. Waddell did not take his title subject to the lien of the judgment. If Waddell had purchased the premises here in controversy from James L. Clay and Sarah E. Clay after the judgment had become a lien on the property, the cases would be analogous.

The precise question has, we think, often been passed on by this court. Thus in Nicholsen v. Walker, 4 Ill. App. 404, which was a case brought under this section of the statute, we said: "The plaintiff's right to the possession of the premises, where the defendant in execution is also the defendant in the action of forcible detainer, ^{is} fully established by the introduction in evidence of the judgment, execution, sale thereunder and sheriff's deed. But where the defendant in the action is a stranger to the judgment, it is apprehended that it must be shown that the party in possession holds the premises in subordination to the title or possession of the judgment debtor and that his right to the possession was acquired by him subsequent

to the lien of the judgment upon which the premises were sold." And in Kingsbury v. Perkins, 15 Ill. App. 340, we said: "An action of forcible detainer under this specification of said 6th clause lies only against 'a party to such judgment or decree;' the parties to the judgment would include only those against whom it was recovered, and those who were bound by it. No privity of estate is shown to exist between appellees and the judgment debtor, and even if that were or could be assumed, it does not appear their possession is in subordination to the title or right of possession of appellant." This language fits the facts of this case.

The judgment of the trial court was right and it is affirmed.

AFFIRMED.

McSurely, P. J., and Devery, J., concur.

351 - 27209

GEORGE F. BLAND WINDELL et al.,
Doing Business as Moscow Automobile
Works,

Appellees,

vs.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,
Appellant.

226 I.A. 687

APPEAL FROM MUNICIPAL

COURT IN CHICAGO.

MR. JUSTICE MARCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiffs below are appellees in this court. They filed a statement of claim against the defendant appellant, in which they claim damages in the sum of \$1942.50 by reason of the default of F. A. Carpenter & Co. under an agreement made by said company with plaintiffs, whereby it agreed to deliver to plaintiffs certain tools and materials. The defendant executed and delivered a bond, in and by which it agreed to guarantee the delivery of these goods by F. A. Carpenter & Co. according to the contract. Copies of the bond sued on were attached to the statement of claim and made a part of it.

The affidavit of merits denied that defendant had undertaken to indemnify the plaintiffs from loss by reason of any default of F. A. Carpenter & Co., but admitted that it did become surety on certain bonds running to the Moscow Automobile Works, a corporation, as it was led to believe. It further set up that its principal had entered into certain contracts with the Moscow Automobile Works on or about December 12, 1916, to furnish materials and equipment for automobiles in two lots or orders; that these contracts amounted in money to about \$37,000; that the Moscow Automobile Works refused to carry out its part of said contract and refused to take and pay for the materials contracted for, and that its said principal was thereby damaged

to the amount of \$10,000, and had a claim for that amount against the Moscow Automobile Works, which defendant in this proceeding had a right to set off against the demand of the plaintiffs, and pleaded the same as a defense. At the conclusion of plaintiffs' evidence the court denied a motion by defendant for a verdict in its behalf, and granted a motion by plaintiffs to instruct the jury to return a verdict for the plaintiffs and assess the damages at the sum of \$1942.80. Motions for a new trial and in arrest were over-ruled and judgment entered on the verdict.

The evidence tended to show that plaintiffs, the Moscow Automobile Works, was a copartnership, consisting of appellants. The appellant contends that the bond which it executed and delivered ran to the Automobile Works, a corporation, and it is not, for that reason, liable to the copartnership, inasmuch as the bond did not run to it. We are cited to a number of cases holding that a firm or association which conducts business transactions under a name importing that it is a corporation is estopped as against such persons to assert its corporate existence. We do not think there is any evidence from which a jury could reasonably find that plaintiffs represented themselves to be a corporation. The language of the bond is, "That we, F. A. Carpenter & Co., Inc., an Illinois Corporation of Chicago, Illinois, as principal **** are held and firmly bound unto the Moscow Automobile Works of Moscow, Russia, its successors and assigns*** The condition of the above obligation is such that if the said F. A. Carpenter & Co., Inc., which has entered into a certain contract hereby made a part hereof, with the Moscow Automobile Works**** shall in due course, make, delivery of such equipment according to the provisions of said contract, and shall indemnify and save and hold harmless the said Moscow Automobile Works, its successors and assigns, from any and all losses***"

We do not see anything in this language which amounts to a representation that the Automobile Works is a corporation. The pronoun "its" might very properly refer to a copartnership as its antecedent. So, also, might a copartnership as well as a corporation be said to have "lawful representatives, successors and assigns."

Appellant also refers to a letter by plaintiffs, dated January 8th, which says, "We referred the matter to our board of directors at Moscow," and it is said that this amounts to a representation that the concern was a corporation. It does not appear, however, that this letter was relied upon by the defendant in the making of the contract.

We think the use of the name "Moscow Automobile Works" is just as appropriate to designate a copartnership as it would be to designate a corporation; that there is no evidence that the defendant was in any way deceived in this respect, and that the point cannot therefore be sustained.

The substantial defense sought to be interposed was that the plaintiffs had given certain other orders for goods to the F. A. Carpenter & Co., and had afterwards wrongfully cancelled the orders, whereby F. A. Carpenter & Co. was damaged in excess of the amount of plaintiffs' claims. These supposed orders, it appears, were thought to have been given by one Broxson, and plaintiffs contend that there is no evidence tending to show that Broxson had any authority to give the orders, while defendant contends that there was at least sufficient evidence to go to the jury on this point. Whether there was or not, we think it unnecessary to decide, as the effect clearly could not be allowed for other reasons. In the first place, that right of action, if it existed, was in F. A. Carpenter & Co., not in the defendant, and it is the general rule that a surety, in the

absence of an assignment, may not set off a right of action belonging to the insured. Graff v. Kahn, 18 Ill. App. 486. In the second place, this alleged right of action was for unliquidated damages, which it is clear, we think, could not be set off by the insurer in an action upon the bond, the contracts being entirely separate and distinct from the contract upon which the suit was brought. Glause v. Sullivan Printing Press Co., 118 Ill., 618; Turnbull & Co. v. Chicago Lumber & Coal Co., 182 Ill. App. 347, Graff v. Kahn, *supra*.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

273 - 27230

ILLINOIS HOULDRING CO.,
a Corporation,
Appellee,
vs.

W. A. DAVIS LUMBER CO.,
a Corporation,
Appellant.

2261.A. 637

APPEAL FROM MUNICIPAL COURT

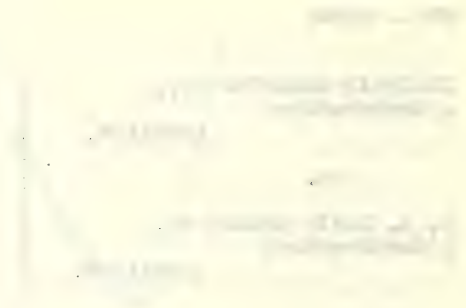
MR. JUSTICE MATHESON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant below from a judgment for the plaintiff in the sum of \$144 entered upon the verdict of a jury after a motion by defendant for a new trial had been overruled.

Plaintiff's statement of claim was based on three different alleged orders for lumber given by plaintiff to defendant, and which it was alleged the defendant accepted, but afterwards failed and refused to deliver the lumber as agreed. One of these orders was No. 5086 for two cars of 4/4 1st and 2nd sap gum lumber at \$44 a thousand feet. This order was placed May 24, 1919. On the same day order No. 5087 for one car of 6/4 1st and 2nd sap gum lumber at \$43 a thousand feet was given. Plaintiff also claimed acceptance by defendant of another order, No. 5303, on October 28, 1919, for one car 1st and 2nd sap gum lumber at \$60 a thousand feet.

As to orders Nos. 5086 and 5087 the affidavit of merits admitted that defendant received and accepted the same, but said that on June 14, 1919, the defendant delivered to the plaintiff 19,583 feet of the lumber ordered; that under the rules and practices of the lumber trade and of the National Hardwood Lumber Association, whose rules and regulations govern the lumber trade, the delivery of this amount of lumber was equivalent to the delivery of two cars and not one car, because the contents of one car, according to the

2000 A.D.



The following table shows the results of the survey conducted in the year 2000 A.D. The data is presented in a tabular format, with the first column representing the year and the subsequent columns representing the various categories of the survey. The data is as follows:

Year	Category 1	Category 2	Category 3	Category 4	Category 5
2000	100	200	300	400	500
2001	150	250	350	450	550
2002	200	300	400	500	600
2003	250	350	450	550	650
2004	300	400	500	600	700
2005	350	450	550	650	750
2006	400	500	600	700	800
2007	450	550	650	750	850
2008	500	600	700	800	900
2009	550	650	750	850	950
2010	600	700	800	900	1000

practice and custom in the lumber trade, runs from eight to ten thousand feet of lumber; that at the time of such shipment freight cars of all capacities were being used by the railroad lines in the middle west, and that the freight car in which this shipment of June 14, 1919, was loaded was of double the capacity of the ordinary freight car for lumber shipping purposes, and that thereby defendant discharged its obligation under order No. 5456 for two cars of sap gum lumber, etc.

As to order No. 5457, the affidavit of merits sets up that this order was accepted without the specification of any definite time for shipment; that the plaintiff knew at the time that said order was given that the defendant was operating a mill for the manufacture of said sap gum lumber in the State of Louisiana, and knew that said mill was in process of construction, and that the time of shipment depended upon the ability of the defendant to manufacture said lumber in said mill and ship the same; that the defendant had a reasonable time after May 24, 1919, in view of all the facts and circumstances, to deliver the said car of 3/4 sap gum lumber to the plaintiff, and the plaintiff had no right to demand the immediate delivery of said lumber; that in the year 1919 the rainfall in the State of Louisiana was double the normal rainfall, and that after May 24, 1919, the rainfall near the mill of the defendant in Louisiana amounted to 196 inches for the year 1919, as against 37 inches of average rainfall in said territory during a year; that by reason of the excessive rainfall it became impossible for the defendant to procure freight cars and operate its mill so as to manufacture, load and ship the lumber in question, and that these facts required the plaintiff to give the defendant a reasonable time after these difficulties were overcome in order to deliver said lumber; that in August, 1919, defendant believed it would be in a position to ship said car of lumber

within the following sixty days, but that it became impossible for the defendant so to do by reason of the conditions aforesaid; that by September 29, 1919, it had become impossible, for the same reasons, for the defendant to get its mill in operation; that in October, 1919, defendant believed that it would make said shipment of lumber between the 1st and 10th of November, but that it then also became likewise impossible to ship said lumber.

As to order No. 5308, the affidavit of merits alleged that the plaintiff did not make any such contract, but said that the plaintiff telephoned to the defendant concerning such an order, and that the defendant wrote the plaintiff on October 29, 1919, requesting the plaintiff to send the defendant the formal order, which formal order the defendant never received. The affidavit of merits also set up facts tending to show that the amount of damages, if any, was less than claimed by plaintiff, and alleged that the suit was prematurely brought. At the close of the evidence for the plaintiff and before the introduction of any evidence by the defendant, the court, on motion of the plaintiff, entered an order, evidently following the practice approved of in Schulte v. Schmohardt, 202 Ill., 539, that the defendant should not be allowed to introduce any evidence under and in support of the affidavit of merits filed, except as to allegations therein to the effect that the fair, reasonable cash market value of 3/4 1st and 2nd sap gum lumber in the months of November and December, 1919, was not \$180 a thousand feet, but was between \$60 and \$70 a thousand feet; and that the fair and reasonable cash market value of 4/4 1st and 2nd sap gum lumber during said period was not \$92 a thousand feet; that a car such as is specified in the orders of the plaintiff does not hold 20,000 feet of sap gum lumber, but it holds from eight to ten thousand feet of such lumber.

During the course of the trial the defendant offered to show by competent evidence that on June 14, 1919, the defendant delivered to the plaintiff 29,843 feet of 1st and 2nd run gum lumber, and that under the rules of the National Hardwood Lumber Association the delivery of this lumber was equivalent to the delivery of two cars and not one car, and other facts set up in that respect by the affidavit of merits, but an objection by the plaintiff to the admission of such evidence was sustained, and it is the contention of appellant that the court erred in this respect, and that evidence as to the known practices and customs of the lumber trade was admissible for the purpose of showing the proper construction to be placed upon the contract between the parties.

On the other hand, it is the contention of the plaintiff below, that the language of the order is not ambiguous; further, that the offer was deficient in that it did not contain an offer to show that the custom was uniformly acquiesced in and long established, or that the plaintiff either had actual knowledge or could be fairly charged with having knowledge of it. And that it further did not offer to show that plaintiff was a member of the National Hardwood Lumber Association, citing Brown v. Churchill, 155 Ill. App. 508; Klaub v. Yokum, 160 Ill. App. 434. Whatever may be the merit of these contentions, we think those of appellant cannot be sustained for the reason that the correspondence of the parties, and especially letters written to the plaintiff by the defendant, place a construction upon the contract which makes it impossible to believe that any such alleged custom or practice was in the minds of the parties to the contract.

The correspondence shows that the plaintiff continually insisted upon the delivery to it of another car of lumber under order No. 5055, and that the defendant, without exception, replied that it would make such a delivery, saying, "We intend to

furnish it just as soon as we possibly can," "we will make shipment in the next few days," etc. These statements are wholly inconsistent with the construction which appellant sought to have put upon the contract through the introduction of this evidence.

There is no better construction of a contract than the one which the parties have themselves adopted, Quillan v. Isel, 272 Ill., 106, and appellant's own construction, undisputed, rendered this evidence inadmissible.

Also, as to the supposed defense set up by the affidavit of merits to order No. 5357, the correspondence of the parties is, we think, conclusive. This correspondence shows that the original agreement was modified as to the time of delivery, and that other and later dates were fixed for delivery. Moreover, as plaintiff points out, the order did not call for lumber manufactured at defendant's mill in Louisiana, and there was nothing to prevent defendant from filling the order by going into the market and buying lumber elsewhere.

But even if the contract had not been thus modified, the affidavit would not, we think, have presented a legal excuse for failure to deliver, because it is the general rule that he who promises unconditionally to deliver is not excused by inability to perform because of inevitable accident or causes beyond his control. Hammer v. Hibbard, 155 Ill., 102; Falcon Coal Co. v. West Chicago Park Commissioners, 221 Ill. App. 163.

It is next contended that as to order No. 5308, the evidence failed to establish a contract between the parties, or at least that there was a question for the jury on that issue, and that it was therefore error for the court to instruct the jury to find the issues in favor of the plaintiff, or, as it did,

the first of these is the fact that the only person who has been
 known to have been in the room at the time of the murder
 is the person who was found with the body. The second is the fact
 that the person who was found with the body was the only person
 who was in the room at the time of the murder.

The third is the fact that the person who was found with the body
 was the only person who was in the room at the time of the murder.
 The fourth is the fact that the person who was found with the body
 was the only person who was in the room at the time of the murder.

The fifth is the fact that the person who was found with the body
 was the only person who was in the room at the time of the murder.
 The sixth is the fact that the person who was found with the body
 was the only person who was in the room at the time of the murder.
 The seventh is the fact that the person who was found with the body
 was the only person who was in the room at the time of the murder.

The eighth is the fact that the person who was found with the body
 was the only person who was in the room at the time of the murder.
 The ninth is the fact that the person who was found with the body
 was the only person who was in the room at the time of the murder.
 The tenth is the fact that the person who was found with the body
 was the only person who was in the room at the time of the murder.

The eleventh is the fact that the person who was found with the body
 was the only person who was in the room at the time of the murder.
 The twelfth is the fact that the person who was found with the body
 was the only person who was in the room at the time of the murder.

to instruct the jury that the only question it might consider was the amount of damages plaintiff was entitled to recover, if any were suffered. Not only did the court give these instructions, but also instructed the jury "that the oral order given by plaintiff to the defendant over the telephone on October 23, 1919, together with defendant's letter of October 25, 1919, constitutes a contract whereby plaintiff became obligated and bound to accept from defendant, and defendant became obligated to deliver to plaintiff at plaintiff's trucks at Third street and Wentworth avenue, Chicago, December 1, 1919, one car of sap gum lumber as set forth, at \$60 per thousand feet." The evidence upon this point was as follows:

Mr. Mellner, general manager of the plaintiff company, testified that on October 23th he had a conversation with Mr. Davis representing the defendant company. He says he called him on the telephone and asked him "about lumber we had coming, car of 4/4 and car of B/4, and he said he was expecting word from his men when shipment would come forward. I said, 'Have you any other lumber you can ship us?' and he said, 'I have some at another point, I think I could get you a car about the first of December.' I said, 'Would he willing to buy more sap from you, and give you a chance to get out on your other order.' He said, 'I could not afford to sell it for less than \$60.' I said, 'You can pick me for one car.' He said he would immediately." On the same day the defendant company wrote plaintiff as follows:

"Gentlemen: Referring to our conversation over the telephone today, we are entering your order for one car of 1" 1st and 2nd Sap Gum at \$60, to be shipped about the 1st of December. Please send us your formal order covering same. Thanking you, we are,
Yours very truly,
W. A. Davis Lumber Co."

On the same day the plaintiff made the order No. 5398 in duplicate. The original was placed in an envelope, addressed

and placed in a U. S. mail box, after a postage stamp had been placed thereon. The duplicate appears in evidence as plaintiff's exhibit No. 36, and is as follows:

April 5/11 No. 5308

Illinois Lumbering Company,
Office and Factory
Western Avenue and 23rd Street.

M. W. A. Davis L. Co.
Cliff

Chicago, 10/28/12
Reg. No.

Please enter our order for the following

Quantity	Description	Price
1	Car 4/4 1st & 2nd Sap Gum Straight stock 10 & 12 ft. @ \$60.00 per M This to be shipped after previous order	

Ship via P. O. B. our track

Illinois Lumbering Company
By REX

Deliver car lots to C. B. & Q. 23rd & Western Avenue
Deliver no goods without order
Mark for Dept.-----."

On October 30, 1912, the defendant wrote plaintiff:

"According to our records you are holding 457 ft of 1" #1 one-on gum laid out of car #71355 UP. Will you kindly advise us whether you can take in this small amount so we can get this matter closed up."

On October 31st plaintiff replied:

"Your favor of the 30th inst. at hand, and we would prefer to have you take back this lumber in question. We would suggest, however, that you hold this open until the other two cars come to hand as more may develop, and if so, it will be worth while to move. If not, we will then arrange to use same."

On November 5th plaintiff wrote defendant as follows:

"Gentlemen: Up to this writing we are still waiting to receive an invoice showing that the car of 4/4 and car of 3/4 on our order were shipped, but without any results. Is there any possibility of getting both of these cars on to us without delay? We would appreciate your promptness in getting this under way or giving us some definite word pertaining to it. Are you in a position to accept an additional order on the car of 4/4 at \$60.00. We could increase this order to about five cars, that is, if you are in position to furnish. Please advise us on this."

On November 13th plaintiff again wrote to defendant,

taking it to task for failure to deliver lumber according to agreement, and stating that they could tolerate no further delay.

On November 14th defendant wrote plaintiff:

"Gentlemen: We have yours of the 13th, and if you will accept the 1" and 1 1/4" Gum on this old order green, we can make shipment within the next few days. As the stock is sold to you at a very low price, we trust you will permit us to make this shipment to you at once. Awaiting your favorable reply, we are," etc.

November 15th plaintiff replied that they would accept the Gum on the old order green, and asked the defendant to see that the lumber was shipped at once, and this letter was acknowledged by the defendant in another letter dated November 17, 1919. Mr. Davis recalls the conversation with Bollner and says, "I told him we would accept his order for a car at \$50.00 each 1st and 2nd Sap Gum. He said he would mail it; never mailed it to my knowledge. We never accepted it." On cross-examination he said that he never received plaintiff's exhibit, order No. 8306, and that he could not say that he used the word "old" in distinction from later order in October, 1919; that he used the word "old" because he had not made the shipment on the two orders which were accepted in May, and that when he used the word "old" he had in mind the old order in May that had not been shipped; that he was expecting to receive it all the time, but never did receive it. The defendant relies on El Reno Grocery Co. v. Bickling, 293 Ill., 456, and points out that the formal order is different materially from the oral conversation - first, in that it provides that the lumber to be delivered is to be 10 and 12 inch lengths, while the lengths were not mentioned in the conversation; second, that the formal order states that the quality shall be what is known as "straight stock;" and, third, that delivery was to be after the previous order. We think, however, the oral conversation as admitted, together with the letter from defendant, constituted an offer and acceptance, and together these form a complete contract. Undoubtedly, the formal

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order which followed, had it been received and accepted without qualification, would have been substituted for the contract already made, but we do not find anything in the evidence to indicate that it was the intention of the parties that the contract should be conditional upon the receipt and acceptance of such an order. Here again the written correspondence between the parties precludes the construction for which defendant contends. In 6 Ruling Case Law, pages 618 and 619, the law applicable is stated as follows:

"Where contracting parties agree to reduce their contract to writing, the question whether their negotiations constitute a present contract, usually depends upon their intention, or, as it is sometimes expressed, upon whether they intend the writing to be a condition precedent to the taking effect of the contract. The expression of the idea may be attempted in other words; if the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract. If, however, it is viewed as the consummation of the negotiations there is no contract until the written draft is finally signed. *** Circumstances which have been suggested as being helpful in determining the intention of the parties, are, whether the contract is one usually put in writing, whether there are few or many details, whether the amount involved is large or small, whether it requires a formal writing for a full expression of the covenants and promises, and whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations."

We think the circumstances here indicate the intention of the parties that the oral conversation as followed by the written letter should constitute a contract, and that the court therefore did not err in instructing the jury to that effect.

²¹
The case of Wene Grocery Co. v. Steeking, supra, is distinguishable in many particulars from the facts in this case, and really turned upon the question of the broker's authority to make the contract. We do not regard it as applicable here.

We think, under the evidence, the question of whether a contract in fact existed as to this order No. 5305, was for the court and not the jury; and we think the court did not err in

giving the instructions, and that the only question properly before the jury was the amount of damages which plaintiff was entitled to recover.

But it is also contended by appellant that the court erred in this point, because, it says, as to orders Nos. 5056 and 5057 the true measure of damages, if any, was the difference between the contract price of the lumber and the best market price of the same. Therefore, it is said, the court erred in admitting evidence of the market price of such lumber in December, which was higher than that of August. The evidence tends to show that the plaintiff purchased the lumber needed by it during the month of August, and defendant says that even if liable, the difference between the contract price and the market price paid in August by plaintiff is the true measure of damages, and that the December price of such lumber was therefore wholly immaterial.

Appellant calls our attention to the letter of the plaintiff sent to defendant, dated August 18, 1919, in which plaintiff said:

"Your favor of 11th inst. at hand, and we desire to state that we are willing to accept and propose the following: We have, as a matter of fact, purchased and bought stock in question that is due us on our orders with you, from other sources, although we were compelled to pay considerable in advance over the price on our orders with you. This lumber will be shipped to us in due course and immediately, and we desire to state if your lumber as per your letter of this date reaches us within the next sixty days, we will accept it and waive our claim of difference in price against you. However, if you fail to deliver or ship said lumber within the period of time mentioned in your letter we will then hold you liable for the difference in price we have been compelled to pay and the purchase price of your lumber.

We have this entire matter intact as to the purchase, and we are quite agreeable to assume the loss ourselves if you will endeavor to ship us the lumber in question. However, your failure to do so will make it necessary to hold you accountable for the difference in price. We request of you an immediate response by mail upon receipt of this letter."

While ordinarily the rule of law as to the assessment of damages would be as defendant contends and as it cites many cases to prove, the correspondence between the parties disclosed a

situation in which we think that rule is not applicable. It shows clearly an agreement between the parties by which the date of delivery was waived in consideration of a new promise by defendant to deliver at a later date, and that date was finally fixed as in December. We therefore think the damages of plaintiff were correctly computed upon the difference between the contract price and the fair cash market value of similar lumber in that market in December, and that evidence was properly received to show what that market price was.

The defendant requested the court to give the following instruction:

"The court instructs the jury that if you believe from the evidence that the plaintiff in the month of August, 1919, purchased on the open market lumber of the quantity, size and quality of that specified in its orders of May 24th, 1919, thereby filling said orders of May 24th, then you are instructed that the plaintiff is not entitled to recover as damages for failure on the part of defendant to fill said orders, more than the difference between the contract price of said lumber and the fair market value thereof as it was in the month of August, 1919."

The court refused to give this instruction, but on the contrary instructed the jury as follows:

"The court instructs you that in order for the plaintiff Illinois Moulding Company to recover in this case, it was not necessary for the plaintiff to have gone out on the market at the time or times when the lumber referred to in this case ought to have been delivered, or at the time of the refusal of the defendant to deliver the said lumber, if you find from the evidence that the defendant did refuse to deliver the said lumber and to have purchased the said lumber. The damages which the plaintiff has sustained, if any, in this case, are not to be determined by whether or not the plaintiff went out on the market and purchased the said lumber, but are to be determined by the difference between the agreed price and the market price at the time and place when the said lumber should have been delivered by the defendant, or at the time of the refusal of the defendant to deliver, if you believe from the evidence that the defendant did refuse to deliver said lumber."

For the reasons hereinbefore indicated we think the court did not err in refusing the one instruction or in giving the other.

The written correspondence in this case, which we have

carefully considered, is controlling and we think establishes beyond doubt that the lumber purchased by plaintiff was not delivered because such lumber was higher in price at the ^{designated} time of delivery than at the times the orders were given.

The judgment will be affirmed.

AFFIRMED.

McCurley, P. J., and Hatchett, J., concur.

and the following is a list of the names of the persons who have been

admitted to the office of the Secretary of the State of New York.

The following is a list of the names of the persons who have been

admitted to the office of the Secretary of the State of New York.

The following is a list of the names of the persons who have been

admitted to the office of the Secretary of the State of New York.

JULIA C. McLEAN, by
Margaret McLean, her
next friend,

Appellee.

vs.

CONSUMERS COMPANY,
a corporation,

Appellant.

226 I.A. 8

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant below from a judgment for plaintiff in the sum of \$3,500 entered upon the verdict of a jury in an action on the case for personal injuries, after motions for a new trial and in arrest of judgment had been overruled.

The action grew out of injuries received by plaintiff, a girl fifteen years of age, when, on the evidence in her behalf tended to show, an automobile in which she was riding was struck by an ice wagon to which a team of horses was attached, and driven by a servant of the defendant. The accident occurred July 23, 1919, at the intersection of Michigan avenue, a public highway extending north and south, with 30th street, which is a public highway extending east and west.

The first alleged error argued is that the court, over the objection of defendant, permitted Margaret McLean, the next friend of the plaintiff, to remain in the courtroom at the trial, although a witness for plaintiff, and a general order excluding witnesses had theretofore been entered. This point is argued at length, and appellant in substance, says, (citing Musk v. Maddock, 67 Ill. App. 464, and I. T. S. v. Becker, 119 Ill. App. 221) that the next friend is in no case

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HEREIN IS UNCLASSIFIED
DATE 10/15/01 BY 60322
UCBAW/STP

1. The following information was obtained from the records of the Department of Defense:

This is an account of the activities of the Department of Defense from 1945 to 1947. The Department was established on July 1, 1947, and was the first of a new kind of government department. It was created by a law which gave it the power to control the military and naval forces of the United States. The Department was the first of a new kind of government department. It was created by a law which gave it the power to control the military and naval forces of the United States.

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a party to the suit, and that she, therefore, should have been excluded with the other witnesses. The cases cited do not sustain appellant's contention. It is held in these cases that "the suit, although attended by a next friend, is the suit of the infant," and "she is not a party to the suit in such a sense that her admissions or declarations out of court should be received." The next friend is there said to be "a manager or conductor of the suit," and this would seem to imply that the presence of a next friend while a cause is being tried, might be proper and desirable. We think the ruling was within the discretion of the court as in the whole matter of the sequestration of witnesses under such circumstances. Briseman v. Briseman, 25 Ill. 119; Staver v. Doe, 49 Ill. App. 426.

It is also urged that the court erred in giving to the jury at the request of the plaintiff, the following instruction.

"The court instructs the jury as a matter of law, that the negligence of the driver of an automobile, cannot be imputed to a guest riding with him, while personally in the exercise of ordinary care for his or her safety, where the driver is not the agent of or under the control of the passenger. The court further instructs the jury that if they find from the evidence in this case that the plaintiff was a passenger in the automobile of one Prove, and that she was riding as his guest, and that the said Prove was not the agent of or under the control of the plaintiff and if you further find that the plaintiff was in the exercise of such care and caution as could reasonably be expected of a person of her age, intelligence, capacity, education and experience under the same or similar circumstances, then and in such an event, you are instructed that the negligence of the said Prove, if any, cannot be imputed to the plaintiff."

Appellant criticizes this instruction in two respects. It says that the instruction implies that if plaintiff had been invited to ride in the car no duty rested upon plaintiff to endeavor to direct and control the driver in avoidance of a danger, unless the owner of the automobile had expressly authorized the plaintiff to take such steps, when the law is that her being in the

car under such circumstances, made it her duty to take those steps. In the second place the instruction is criticized because, as it is said, it assumes a proposition utterly inconsistent with the law, viz. that plaintiff could be in the exercise of ordinary care for her own safety, even though she did not do anything to warn the driver of imminent danger.

As to the first criticism, we do not understand that, as a matter of law, it was the duty of the plaintiff to attempt to direct and control the driver. That her duty might be in that respect would necessarily depend upon the particular facts of the case. We understand the rule to be that a guest riding in an automobile must exercise ordinary care, and if ordinary care should require a warning to the driver, then it is the duty of the guest to give it. Appellant cites as sustaining its contention the case of Opp v. Fryer, 294 Ill. 538, where an instruction was criticized which told the jury that if they believed from a preponderance of the evidence that the plaintiff was a guest in the automobile at the time of the accident at the invitation of the owner, without authority to direct or in any manner control the conduct of the driver of the automobile, and that before and at the time of the accident she was in the exercise of ordinary care for her own safety, then the negligence of the driver of the automobile, if any, could not be imputed to her. But the court in that case held this instruction to be erroneous "in view of the evidence," and the circumstances there, were not at all similar to those which appear here. The court did not say in the Opp case that the instruction did not correctly state the law, and no circumstances exist in this case such as led the court there to hold that the plaintiff had a particular duty to perform in the way of warning the driver.

Moreover, in this case the numerous instructions given by the court at the request of the defendant were even more

favorable to the defendant than the law warranted. By the eighth instruction the jury was told by the court that a person riding as a guest or by invitation with the owner and driver of a vehicle, although he had no authority over such owner or driver in the operation of the vehicle, was still required to exercise reasonable care for the common safety, and that his or her failure to do so, in common with the negligence of the driver or owner, if shown by the evidence, would prevent a recovery, and that if the jury believed from the evidence that the plaintiff could have foreseen the accident in question in time to have warned such owner or driver, so that said accident could have been avoided, and that she failed in that regard, and that such failure on her part, considering her age, intelligence, experience and capacity, contributed to the injury in question, she could not recover.

By the tenth instruction given at the request of the defendant, the court further told the jury that a guest, passenger or occupant of a vehicle, as well as the driver, is bound to exercise due care and caution, and that if the negligence of the person riding with driver as such guest, passenger or occupant, contributes in any way proximately to the accident, no recovery can be had for injury resulting therefrom, and that if the plaintiff, considering her age, etc. could have prevented the accident in question, and that she failed in the exercise thereof, and that such failure on her part contributed to her injury, then she could not recover.

And by the twelfth defendant's instruction, the court told the jury that if they believed from the evidence that the driver of the vehicle in which the plaintiff was riding at the time of the alleged accident, was negligent in the operation and driving of said vehicle, at the time and place in question, and that such negligence was the sole cause of plaintiff's

injury, then they should find defendant not guilty.

Defendant's instruction No. 13 told the jury that while it is a general rule of law, that where a person is riding merely as a passenger in a vehicle which is driven by another and where such passenger has nothing to do with its management or control, as in case of a hired vehicle, such as a cab or carriage, the negligence of the driver of such vehicle cannot be imputed to such mere passenger; but if the jury believed from the evidence in this case, and under the instructions of the court, that the plaintiff at the time and place in question, while riding in the automobile in question, in a southerly direction down Michigan avenue, a certain public highway in the City of Chicago, and approaching 30th street, a certain other public highway, intersecting said Michigan avenue, saw the team and wagon in question, crossing said Michigan avenue at said 30th street in a westerly direction, and that she saw and knew that the driver of said automobile was about to continue in said southerly direction and said team and wagon in a westerly direction, and saw danger of collision of such automobile with said team and wagon if said automobile continued its course, and that the plaintiff did not give the driver of said automobile any warning of such danger, and made no attempt to do anything for her own safety and protection; then in such case the jury were instructed that if they believed from the evidence that she did so fail to give such warning, and did so fail to do anything for her own safety and protection, and that such failure on her part, if they believed from the evidence that she did so fail, was negligence on her part, which tended proximately to cause the accident and injury to herself, taking into consideration her age, intelligence, capacity and experience, then she could not recover, and the jury should find the defendant not guilty.

By instruction No. 17 the jury was told that if the driver of the automobile in which the plaintiff was riding, saw or by the exercise of ordinary care, could have seen the vehicle and team of the defendant crossing Michigan avenue in time to have stopped his automobile, and that it was negligence on his part not to note the team and vehicle of the defendant were upon the said highway at the intersection in question, and to stop the said automobile in time to avoid the said injury in question, then the verdict should be for the defendant.

We think that these instructions, which practically told the jury that it was the duty of a fifteen year old girl, holding a five year old child in her lap and sitting in the rear seat of an automobile, to warn the driver of the automobile of the approach of an ice wagon from an intervening intersection, which the driver could plainly see, as well as she, was, to say the least, as favorable to the defendant as the law required.

Appellant also insists that the plaintiff was guilty of contributory negligence as a matter of law, and this on the theory that it was her duty to warn the driver of the approach of the ice wagon and the team, which the evidence tended to show came galloping from the east towards the intersection. It was the duty of the driver of the team to stop at the boulevard before proceeding across, and we think plaintiff had a right to presume that that legal duty would be performed. We may add that we very much doubt the duty of a fifteen year old girl, sitting in the rear seat, and holding a child in her lap, a girl, who so far as the evidence shows, had never herself driven an automobile, to attempt to give directions to and exercise control of an experienced driver.

Appellant also argues at length that the verdict is contrary to the evidence and against its manifest weight. We have gone carefully over the evidence as presented in the abstract.

There is a direct conflict as to the manner in which the accident occurred, that for the plaintiff tending to show that the pole of the ice wagon struck the automobile in which she was riding with such force as to turn it round and drive it against another automobile, while the evidence for defendant tends to show that the driver of the team drawing the ice wagon turned towards the south and thus avoided striking the automobile. One or the other group of witnesses is not telling the truth, but the jury has passed upon their credibility, and we are not able to find anything in the record which would justify us in saying that the verdict is manifestly against the weight of the evidence. The damages are not excessive, as appellant contends, and the judgment is affirmed.

AFFIRMED.

McSurely, F. J., and Dever, J., concur.

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ANNABELLE MCLAY,
Appellee,

vs.

MARY HONNATH,
Appellant.

226 LA 638

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATHESON DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant below seeks to reverse a judgment for \$1,000 entered on the verdict of a jury. The action was in case. The declaration alleged the malicious prosecution of the plaintiff by the defendant for the violation of a municipal ordinance. The judgment was entered on the 25th day of February, 1921, and the record shows the defendant was absent when the case was tried and judgment entered. More than thirty days thereafter the defendant filed a petition asking that the judgment be vacated. The prayer of the petition was denied, apparently upon the theory that it was insufficient, as the plaintiff was not ruled to answer it. The petition was filed under section 21 of the Municipal Court act, which in substance provides that such a petition must set forth grounds for vacating, setting aside or modifying the judgment which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity.

That such a petition is in fact the beginning of a new suit was decided in Dexia v. Halling, 207 Ill. app. 6; and it has been held that "it must be affirmatively shown in such petition that the judgment was not only inequitable and the result of fraud, accident or mistake, but also that the judgment was not due to any negligence on the part of the petitioner." American Surety Co. v. Elias, 214 Ill. app. 264; Holmes v. Strauss, 204 Ill. App., 307-8.

The petition of the defendant in this case set up that summons was served on her September 18, 1920; that she appeared in response thereto, having with her an interpreter who could translate spoken English into Hungarian, that being the language which she understood; that she could neither write nor read; that when she appeared she was told by the Judge that she would be notified later, and the interpreter told her to go home, that she would be notified when to come back; that she knew nothing further about the matter until notified by her husband that he had made inquiries and that the clerk of the court had told him that the case had been dropped. She further alleges that she did not learn of the trial or judgment until after thirty days thereafter, and after an execution had been issued upon the judgment and placed in the hands of a deputy bailiff of the Municipal court; that said deputy bailiff delivered a copy to the petitioner on March 27, 1921. She denies that she was indebted to the plaintiff in any way, and alleges that she has a good and valid defense to the suit; denies that she has been guilty of any negligence and delay, and in another affidavit sets up in detail facts which if true show that the judgment is wholly unjust.

The abstract shows that the claim of plaintiff was somewhat trivial in character, and the amount of the judgment is clearly excessive. We think the court, in the exercise of its discretion, should have required defendant to answer the petition, and if upon the hearing the facts were sustained, should have set aside the judgment.

For the reasons indicated the order denying the prayer of plaintiff's petition will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Deyer, J., concur.

ABRAHAM SITRON,

Respondent,

vs.

JOSEPH ACHARDINI,

Appellant.

226 I.A. 638

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an order denying his motion to set aside a judgment theretofore entered on the verdict of a jury, in an action on the case for alleged slander. The evidence was heard, the verdict returned, and the judgment entered on November 22, 1920, and in the absence of the defendant and his counsel.

Two days thereafter notice was given of the motion to set aside the judgment, and in support of this motion certain affidavits were filed. Certain affidavits in opposition to the motion also were received and read and in so far as these related to the merits of the case, should not have been considered.

Hallin v. Penney, 309 Ill. App., 230; Gilchrist Transportation Co. v. Northern Grain Co., 204 Ill., 510; American Mail Order Co. v. Marsh, 118 Ill. App., 246; Alconker v. Osborn, 177 Ill. App. 364.

The affidavits in support of the motion tended to show ~~that~~ a good defense upon the merits, as the defendant in his affidavit specifically denied that he had at any time uttered the alleged slanderous words.

By way of excuse for his absence at the trial, the attorney for the defendant made oath that while the cause was on the call he appeared and announced that the defendant was ready, but the plaintiff said that his attorney was engaged in the trial of a case in the U. S. District Court, and that it was impossible to determine exactly when the said attorney would be

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able to try the case; that it was several times continued by agreement on account of the engagement of plaintiff's attorney, and was finally called for either Thursday, November 11, 1920, or Friday, November 12, 1920; that each time it was stated that plaintiff's attorney would soon be ready to take up the trial; but that the attorney for the defendant then stated to the court that he intended to try a case in the U. S. District Court for the Northern District of Illinois on Tuesday, November 16, 1920, and by agreement the case was then continued to Wednesday, November 17, 1920; that on November 16, 1920, he met attorney for the plaintiff in the U. S. District Court, and there had a conversation with him, which in substance was that attorney for defendant then told attorney for plaintiff that he would be engaged in that court on the following day, to which affiant responded that he did not wish to take advantage, but did not like the idea of appearing every day just to have the case continued; that attorney for plaintiff then said, "Well, I will tell you what I will do; I will have the case watched and have it continued on account of my engagement so that you will not have to bother with it," and the affiant said in reply that that would be fine, and that he should be informed a day ahead so that he should get his witnesses in; that on Wednesday, November 17, 1920, the affiant appeared before another Judge of the Circuit court, where he met one Fleckels, who was taking care of the case for the plaintiff's attorney, and informed Fleckels of the conversation, to which Fleckels replied that he knew about it and would watch the case and would keep the affiant informed and notify him a day in advance. The affidavit further states that, relying upon these promises, he did not attend to the case, as he had no clerk, but was at all times ready for trial, and was simply awaiting notice from the attorney for the plaintiff; that

[illegible]

he did not know that the case was on trial until inquiry at the court November 22, 1920. He was informed that an ex parte judgment had been taken on the day previous.

The affidavit of Gisela Fieck, the young lady in charge of the telephone in the office of the attorney for defendant, states that about eleven o'clock a. m. on Monday, November 22, 1920, some one called up on the telephone but did not give any name and did not ask for Mr. Teller, defendant's attorney, but started to talk about a "Giffen case;" that as she knew nothing about it she told the party to wait a minute, said she would get another attorney in the office, and asked the caller to hold the wire; that as soon as she could get Mr. Kashbaum, the other attorney, she connected the call with him, but found that the party who had called up had already disconnected, but had given no definite information as to the case.

Elsie Schur, also in charge of the switchboard, makes affidavit that she did not receive any message from plaintiff's attorney or from any one about the case, and that she and Gisela Fieck were the only persons who took messages over the 'phone on Monday, November 22, 1920.

As to the conversation between the attorneys for plaintiff and defendant in the Federal Court, defendant submitted, in addition to the affidavit of the attorney himself, the affidavit of Israel Cowan, a practitioner at the Chicago Bar for over thirty years, who says that he was present and heard the conversation in substance as stated by Mr. Teller, while the affidavit as to the conversation with Fieckels is supported by an affidavit of one Sam Frank, who says that he was present and heard it.

The attorney for plaintiff denies that he promised to give one day's notice of the time when the case would be

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called; says that he had no more means of knowing when that case would be called for trial than any other person; that it was reached on Monday, November 22d, a few minutes before eleven a. m., being last on the call of about fifteen to twenty cases; that it was then passed until two o'clock; that immediately thereafter he called up the office of Mr. Teller and informed the person who answered the call that this case would be heard at two o'clock p. m., there being no case in the way of a hearing; that the person who answered the telephone stated, as he understood it, that one would advise Mr. Hashbawn. This affidavit is corroborated by that of Fieckels, who says he was present at the time the attorney for plaintiff telephoned to the office of the attorney for the defendant.

The rules of law applicable to cases of this kind are well settled. A motion like this is addressed to the sound discretion of the court, and will not be reviewed except in case of abuse of discretion, and the moving party must show that he acted with due diligence to protect his rights and that he has a meritorious defense. Ritsche v. City of Chicago, 230 Ill. 260. It is, however, also true that the long and well settled practice of the courts of this State shows liberality in setting aside defaults at the term in which they were entered, where it appears that justice will be promoted thereby. This doctrine was stated in Mason v. McNamara, 57 Ill., 274, as follows:

"But where it appears by affidavit that the party has a defense to the merits, either to the whole or a material part of the cause of action, it has been usual to set aside the default, if a reasonable excuse is shown for not having made the defense. It has also been the practice to impose reasonable terms upon the defendant as a condition to allowing his motion, such as that he plead to the merits, that he pay the costs or that he comply with such other reasonable terms as may be imposed. In such cases the object is that justice be done between the parties, and not to permit one party to obtain and retain an unjust advantage."

See also Waugh v. Euter, 3 Ill. App., 271; Allen v. Hoffman, 12 Ill. App. 575; Carlin v. Gregory, 14 Ill. App. 601; Black v. Casey, 22 Ill. App., 417; Hallin v. Ferry, 24 Ill. App. 230; City of Moline v. C. E. & M. R. Co., 26 Ill. 68; McAuliffe v. Peabody Coal Co., 231 Ill., 218.

We are disposed to hold, in view of all the facts here made to appear, that the court, in the exercise of its discretion, should have set aside the judgment and permitted the cause to be tried upon its merits. To that end the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Dever, J., concur.

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HENRY KRAUSE,
Appellee,
vs.
GRANE COMPANY,
Appellant.

226 I.A. 638

APPEAL FROM THE SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered in favor of plaintiff in the sum of \$500, upon the verdict of a jury. The action was in case. There have been two trials, in the first of which the jury disagreed. Originally there were six counts in the declaration, but two, based upon the "Occupational Diseases Act," were dismissed before the cause was submitted to the jury. The other counts allege in substance that March 25, 1916, and prior thereto, defendant was engaged in manufacturing in the city of Chicago, and that plaintiff was in defendant's service; that in the process of manufacturing defendant operated a large number of emery or grinding wheels, which were used in the grinding of iron, brass, steel, and other metals; that plaintiff in the performance of his duties was required to work at one of these emery wheels; that in the process of grinding the metals on the wheel particles of metal and other dust were thrown off and permeated the air; that there was then in force and effect a statute which required any person operating a factory or workshop where such wheels were used, to provide the same with blowers or similar apparatus, which should be so placed as to protect the person using the wheels from the particles of dust produced, and to carry such dust away and outside the building, or to some receptacle so placed as to receive and confine it; that every such wheel should be fitted with a cast iron hood or hopper of such form and so applied that the dust or refuse would fly from the

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There is no doubt that a full and complete knowledge of the world is essential to the well-being of the human race. The world is a vast and complex system, and it is only by understanding it that we can hope to improve it. This knowledge is not only essential for the individual, but also for the community as a whole. It is the foundation upon which we build our lives, and it is the light that guides us through the darkness of ignorance. We must therefore strive to acquire this knowledge, for it is the only way to ensure a better future for ourselves and for the world we live in.

wheel or be thrown into a hood or hopper by centrifugal force and carried off by the current of air into a suction pipe attached to the hood or hopper; that each and every such wheel six inches or less in diameter should be provided and connected with such pipes, and should run at the rate of speed specified in the statute.

The declaration further charged that the defendant carelessly and negligently failed to comply with the provisions of the statute, and that the plaintiff, in the exercise of due care, was required in the performance of his duty to work in the dust caused by this emery wheel, and to inhale the same, and that he thereby contracted the disease of tuberculosis.

The defendant pleaded the general issue. At the close of all the evidence defendant made a motion for a directed verdict, which was denied, and the denial of this motion is the principal error assigned and argued. Appellant also contends that the verdict is contrary to the manifest weight of the evidence, and asks that the judgment of the trial court be reversed without remanding, and says that if the defendant's position on the substantive issue presented is not sustained, it does not desire a retrial of the case, but would in such event, prefer to have it affirmed. There is practically no contradiction in the evidence except in the statements of the experts.

The plaintiff, Henry Krause, was at the time of the trial an unmarried man about thirty years of age. He began to work for the defendant in 1908, and in September, 1913, commenced working upon grinding cutters used in milling machines, and continued doing such work until December, 1915. His evidence tended to show that he worked practically continuously at this grinding during that period, but evidence submitted by defendant tended to show that the greater portion of his time was spent in setting

tools, and that he worked at actual grinding only about two and a half hours to three hours in any one day, and that some days he did not grind at all.

The emery wheels upon which Krause worked were $3/8$ ths of an inch in thickness, 6 inches in diameter when new, and were kept in use until they were ground down to a diameter of from 2 1/2 to 3 inches. The operator sat at right angles to the plane in which the emery wheel revolved. Milling cutters were held in a holder, and the operator could turn this around and slide the same back and forth under the emery wheel. The room in which plaintiff worked was about 150 feet long and 50 feet wide, with a ceiling 13 feet high and windows on either side of the room.

The uncontradicted evidence tends to show that the sanitary conditions under which plaintiff worked were, as to ventilation and light, good. There was a sharp conflict in the evidence as to whether in any grinding on an emery wheel such as the one at which plaintiff worked, dust would be thrown in the grinder's face. The testimony for plaintiff tended to show that such dust was created and would be inhaled by plaintiff; while testimony for defendant indicated that little dust was made, and such as was made was not thrown in his face, but away from it. The evidence also tended to show that plaintiff had never been sick or in ill health before he worked for the defendant company.

Plaintiff's evidence is positive. He says: "After I started grinding cutters I worked at it continuously." "I worked there many times pretty near all day. The dust got inside me; it choked me many times." The evidence also shows that after plaintiff began working on the wheels he started to cough and sneeze; that in March, 1914, he noticed that his weight decreased; that he did not have an appetite and felt tired; that in the latter

part of 1914 or beginning of 1915, he first noticed that he was sick, and defendant company's doctor attended him; that at that time he had bronchitis, would cough and raise sputum; that he got worse, and in February, 1916, went again to the doctor; that he complained to the doctor who attended him during this attack of bronchitis that he was restless, nervous and unable to sleep, and in response to questions from the doctor as to his habits plaintiff said that his hours of rest were irregular; that he kept late hours; that he would go two or three times a week to public dance halls and pick up some girl and have sexual intercourse with her three or four times in quick succession; that the physician advised him to change his habits; that over indulgence was lowering his powers of resistance; that he afterwards told the physician he had corrected his habits, was sleeping more regular hours, and sleeping and resting better.

March 9, 1916, plaintiff was taken with an acute attack of chills and fever, and was sent home by direction of the doctor in charge of defendant's medical department. His family physician, Dr. Young, then took charge of the case and diagnosed it as purulent bronchitis. In the following month an examination of the sputum showed tubercular bacilli. After a few weeks plaintiff went to the country and his condition apparently improved. In August, 1916, he went to the Municipal Tuberculosis Sanitarium, where he remained until the fall of 1917, when he was discharged. He was then employed for about a year as guard on the Northwestern elevated railway, and afterwards went to Lincoln Park, where he has since been employed as gardener. There appear in evidence x-ray pictures of the plaintiff's chest and lungs taken August 3, 1916, April 24, 1918, and February 13, 1920.

The uncontradicted evidence of the physicians based upon these plates is that the tubercular process in the plain-

Plaintiff's lungs had continued for some time, and that the later pictures show an improvement. Plaintiff's normal weight was about 145 pounds; that this weight was at one time reduced to 127 3/4 pounds. It was shown that the floor of the room in which he usually slept prior to his illness was about 7 feet by 12 feet, and the floor was about a foot from the ground; the room had one window which opened on the east side of the house, and it was about five feet from the adjoining house, which was two and one-half stories high. This room was used as a sleeping room by plaintiff, two of his brothers and a sister. It was somewhat dark and little sunshine penetrated in.

The uncontradicted evidence is that the emery wheel at which plaintiff worked was in fact not equipped with a fan suction and a blower, as required by the statute, and no attempt was made to comply with the law in this respect. Indeed, one of the witnesses who testified that no dust was thrown by said machine was a deputy factory inspector employed by the State. Defendant's plant had been run under the same general conditions as to this grinding work for a period of 25 years, an average of 60 or 70 men had been engaged doing grinding of this kind, and the defendant's physician states that so far as he knew, no other workman had ever contracted tuberculosis while employed in that department.

The evidence also shows without contradiction that the plaintiff lived at home with his father, who is 63 years old, who had never had a cough or trouble with his lungs; that the mother, who was 59 years old, had never had consumption or any trouble with her throat or lungs; that five children were born to these parents, and that all of them were living and at home, but none of the other children had any cough or consumption.

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The medical testimony is conflicting. Dr. Young, who attended the plaintiff, testified that he first arrested him about March 20, 1918; that he found him in bed at home; that his temperature was 102½ or 103 degrees; that he had a rapid pulse, a persistent cough which brought forth a mucous-purulent expectoration, which was yellowish and almost greenish and at times blood-streaked; that he was sweating profusely and complained of severe pain in the chest; that he found some dullness on percussion; that he found the usual moistened and bubbly rales over practically every portion of the lungs; that plaintiff seemed to be very much exhausted. In response to a hypothetical question based upon the testimony, but which omitted matters as to his living conditions, sexual indulgence, etc., witness replied that it was his opinion that "mechanical particles inhaled would cause sufficient irritation of the lung and the bronchi to lower resistance, and thereby result in further infection by the tubercle-bacillus." He further expressed the opinion that the tubercular condition which he found in the patient is usually considered permanent. He had not, however, specialized in the disease of tuberculosis, or made any special study of the effect of dust. He says that anything that tends to break down the resistance makes the individual more susceptible to the development of tuberculosis, such as insufficient food, improper clothing, long hours of work, sleeping in a poorly ventilated room, alcoholism, loss of sleep and excessive sexual intercourse; that all these elements should be taken into consideration in determining the possible cause of the development of tuberculosis; further, that post mortem examinations show that practically every individual has had some tubercular process in his lungs sometime during his life. He testified that there is only one organism that causes tuberculosis; that streptococcus or mixed infection has a predisposing influence towards the development of a

The national Congress is gathering. The Congress, which
includes the President, President-elect, Vice President, Vice-elect,
Speaker of the House, Speaker-elect, and the members of the House
and Senate, will meet in the Capitol building, Washington, D.C., on
January 3, 1921. The President-elect, Mr. Woodrow Wilson, will
be inaugurated on January 20, 1921. The Vice President-elect, Mr.
Thomas R. Marshall, will be inaugurated on the same day. The
members of the House and Senate will be sworn in on January 3.
The Congress will then proceed to the business of the session.
The President-elect, Mr. Wilson, will deliver the inaugural
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latent tubercular process; that working in metal dust, steel or emery dust has an effect on the causing of bronchitis; that the recurrence of bronchitis would cause a condition which would be fertile for the location of a tubercular germ; that it predisposed towards the location of such a germ.

Dr. Nathaniel H. Adams testified that he examined the plaintiff in April, 1918, and that at the time plaintiff had tuberculosis; that it was not in an active condition, although there were chronic elements. The witness said that there was, in his opinion, connection between the condition of bronchitis and the location of tuberculosis in the lungs; that dust from grinding metals on emery wheels where steel and emery dust is present is sharp and cutting and irritates the lining of the tubes and the lining of the vesicles sometimes, so that it is a very potent cause of bronchitis and lung disease; that excessive sexual intercourse would not have any effect upon causing a man to have bronchitis, but it might be detrimental after he was sick.

In response to a hypothetical question based upon the evidence, the witness stated that there would be something in the hypothesis "that would be a good and sufficient cause for the setting up of tuberculosis, and that would be the inflamed lungs, and the cause in the hypothesis for the inflamed lungs is the emery and metal dust - scissor grinder's consumption." He agrees that there is only one cause of tuberculosis - tubercular bacilli; that all people at some time in life undoubtedly breathe these; that all autopsies show tubercular scars on the lungs in adults; that ten per cent. of people die of tuberculosis; that the reason that some individuals have tuberculosis, while there is apparently no ill effects with others, is that with most people, most of the time, their mucous membranes are normal

and their secretions are more or less anti-bacterial, with more or less power to diminish the vitality of the tubercular germ, so that the germs do not find ready lodging and a place to grow in; that in other words, the seed is sown upon poor soil in most individuals, but if the soil happens to be good, the seed will take root and grow. He said: "We are breathing germs all the time. When the surface is out, the germs will go in and inflame the part. Emery is pretty nearly as sharp as diamond dust. Brass is a poisonous dust; it adds a poison on top of a sharpness."

Dr. Seyl testified for plaintiff: "Tuberculosis bacillus is the only thing that ever causes tuberculosis; it is a well known, defined germ." He says that the tubercular germ is probably omnipresent. In response to a hypothetical question, which, however, omitted living conditions, and the matter of sexual indulgence, he said: "I attribute the tuberculosis in this hypothetical person to the tuberculosis germ. Everybody may breathe it in. I attribute its localizing and creating the lung trouble to the grave possibility of the lowered resistance of the lung, the impaired or impoverished condition of circulation being poor; local anemia." He says that a man of the age of plaintiff, in sound physical health, might breathe in a tubercular germ, and that if there was not present any inflammation in his lungs by reason of irritation or cutting by emery powder or steel dust, or anything like that, might breathe in the germ and never have tuberculosis; but if he had such irritation he would be greatly predisposed to it. He says that if a person had a tubercular condition, he might have mere sexual desire but sexual intercourse would not have anything to do with creating a field for tuberculosis.

Dr. Wechlick, one of the defendant company's physicians at the time plaintiff worked for defendant, testified that plaintiff made a complete recovery from the attack of bronchitis, and

that on April 30, 1916, the witness examined the sputum and found that it showed pneumococci, streptococci and tubercular bacilli; that he talked it over with Dr. Harvey and that Dr. Harvey then called up Dr. Young and told him the facts. He said that not only does sexual intercourse, but everything that goes with it - loss of sleep, late hours, smoke laden atmosphere, dusty ballrooms - have an effect in reducing the physical resistance which would favor the growth of tubercular germs. He also says that bronchitis is a germ infection, and that everybody breathes in these germs to some extent; that dust or inflammation of the bronchial tubes does not necessarily make lowered resistance, but may sometimes; that if you have an acute attack of bronchitis and get into your system a tubercular germ, you have a fertile field for a tubercular germ to locate. He says that the larger particles of dust breathed in are filtered out by the vibrissae in the nose, and that he does not think that they would lacerate or wound the tissue of the lungs themselves; that there is a difference in individuals and what is excessive sexual intercourse for one is not for others.

Dr. LeCount, a medical expert, testifying for defendant, said that tubercular scars on the lungs are very common; that sunlight is supposed to heal tuberculosis and is able to kill the germ; that it used to be reckoned that one in every seven persons died of tuberculosis, but it is probably one in about every ten now; that the disease is widespread and attacks all sorts of people; that tuberculosis is usually transmitted from a person or from an animal to a person; that it is scattered by the minute droplets of moisture that come out of the air passages of one person and are breathed in by another; that the moisture is collected on dust particles in the air; that there are a number of factors that explain why some persons may have tubercular germs in their lungs without apparently suffering any ill effects, while in others the germ develops disease

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which not infrequently results in death. He says that there is a race susceptibility, and there is the fact that tuberculosis by itself frequently heals; that another factor is the lowering of the resistance of ^{the} individual by living in poor surroundings, lack of proper food, and also other infections; that acute bronchitis is a germ disease; that sleeping in a dark, damp bedroom tends to lower resistance; that it would not be considered either sanitary or hygienic for four people to sleep in a room 7 feet by 12 feet, with one window, and with practically no sunlight coming through. This witness also said: "The inhalation of emery dust cannot produce tuberculosis," and in response to a hypothetical question said, "I do not think, from a medical standpoint, that the grinding which this man did, on a desk bed, during the period from September, 1913, to December, 1913, is sufficient to account for the development of tuberculosis in him." He further said there was a condition in fact set forth in the hypothetical question which in his opinion would, from a medical standpoint, be sufficient to account for the development of tuberculosis, which was that there was the one attack in the spring and another attack of acute infection in December, 1914, and one in March, 1915; that these acute infections of the respiratory organs are known to break them down and cause outbreaks of tuberculosis; that the sleeping conditions were not so important as the infections; that dust from stone or metals would bring about scar tissue, and if scar tissue surrounds the tubercular process, the result is its localization, and that this is what constitutes arrested tuberculosis.

Dr. Wilbur Johnson testified that he had examined plaintiff on May 3, 1918, and found tuberculosis moderately advanced; that he was of the opinion that it was a chronic affair

of several years duration; that during the past three years he had examined plaintiff possibly six times a year, and there had been a steady and gradual improvement. He said that an acute attack of bronchitis with mixed infection, streptococcus and pneumococcus, would tend to produce a condition in the lungs favorable to the development of tuberculosis; that there is no specific germ causing bronchitis; that everyone breathed germs, and the explanation why in some cases they caused disease and not in others, he would say was the lowered resistance, the constitutional condition of the patient.

Dr. Robert Hayes, examining physician for the Chicago Municipal Tuberculosis Sanitarium, testified for defendant that he first examined plaintiff in May, 1916. He says that tuberculosis is a disease that attacks all classes; that fibrosis is really scar tissue; that whenever there has been an inflammatory process and healing takes place, the healing consists of the formation of fibrous tissues; that patients who have had a tubercular process frequently live to old age and experience little ill effects; that colds are in fact intermittent infections that are due to bacteria getting into the tissues of the body; that colds are transmitted by contact, and that there is a similarity with the way tuberculosis is transmitted; that the explanation why tubercular germs apparently have no effect on one individual when introduced into the system, and have most serious effects on another, is the power of the tissues of the body to produce immunity toward that bacteria; that it is a matter of debate why certain individuals will have this immunity while others will not; that some people are naturally immune to any disease; that lowered resistance makes the tissues susceptible to disease; that there are many things that tend to lower resistance, some of the most common

being intercurrent infections, frequent infections, exposure to the elements, impure air, bad living conditions, extreme exercises, producing constant fatigue, long hours and over-indulgence; that if a man twenty-five or twenty-six years of age had sexual intercourse three or four times in rapid succession two or three nights a week, it would have the effect of lowering his resistance. In answer to the hypothetical question propounded to Dr. LeCount this witness answered, "I do not think from a medical standpoint that the grinding that this man did, as described, during the period from September, 1913, to December, 1916, was sufficient to account for the development of tuberculosis in this man." His reasons as stated were that the man had been employed only a few hours a day, and was actually grinding a small fraction of the hours he was employed; that the environment and conditions under which he existed the rest of the twenty-four hours could have a great deal more to do with the tubercular condition which developed than any form of labor that he might carry on. The witness said that the things that appear most prominent in the hypothetical question from a medical standpoint, as being sufficient to account for the development of tuberculosis, were the general housing conditions, the matter of fatigue, sleeping quarters, his living conditions and fatigue from exertion. The medical history as given in May, 1914, showed that plaintiff had prolonged infection and bronchitis; that again, inside of a year and a half from December, 1914, he had another intercurrent infection that caused him to lose weight, and he suffered from bronchitis for several weeks; that it is these prolonged and protracted intercurrent infections that gradually broke down the tissue and led up to tubercular infection. The witness said that he had never known the inhaling of dust to produce the bronchitis; that any inflamed tissue means lowered resistance to the part that tissue is a parcel of.

Dr. Orville W. McMichael testified that tuberculosis is a disease produced by the tubercle bacillus; that sunlight will kill this bacillus; that the bacillus grows best in the dark; that the generally accepted opinion is that practically everybody becomes infected with the tubercle bacillus; that the explanation as to why nearly everyone at some time or other picks up the germ of tuberculosis and it seems to have no effect on some, but produces such serious results in others, "is that the blood of all of us will destroy a limited number of tubercle bacilli, and it depends somewhat upon the size of the dose and upon the condition of our blood whether we become diseased by it;" that from an examination of the photographs of the home in which plaintiff lived, he would say that the living conditions were bad; that four people in a room would have an injurious effect upon the atmosphere, and would lower the vitality of all four of them; that lack of sufficient food, lack of rest, and mental worry are very bad features in reducing the resistance of individuals; that tuberculosis more frequently follows infections than other diseases; that bronchitis with a mixed infection of streptococcus and pneumococcus is one of the principal causes of lowered vitality which permits tuberculosis to develop; that he thought sexual intercourse, as described, would have the effect of lowering plaintiff's vitality; that the X-ray pictures indicated that the tuberculosis was of rather long standing, by which he meant several years. He said that the incidence of tuberculosis is quite high among tailors; that the further we get along with our studies as to the relation between the breathing of inorganic dust and the development of tuberculosis, the further we get away from the idea that dust has very much influence, because it is found that the existence of tuberculosis is greatest

where the living conditions are bad, and in many of the places where dusty occupations prevail, the living conditions are also extremely bad; "that we are gradually getting away from the idea that we previously held that dust had so much influence;" that dusts were organic and inorganic; that limestone dust tends to promote fibrosis in the lung, which is the healing process in tuberculosis and retards rather than aggravates it; that sunlight, fresh air, good food and rest are good slogans in preventing tuberculosis, because they improve the vitality. In response to the hypothetical question submitted to Dr. LeCount this witness said: "I think from a medical standpoint, that the griding that this man did from September, 1913, to December, 1918, is not sufficient to account for the development of tuberculosis in this man because the other factors mentioned, the infections and the living conditions, would be infinitely more likely to exaggerate and promote the development of tuberculosis. The infections mentioned are, in my opinion, from a medical standpoint, sufficient to account for tuberculosis in this man." This witness said that the housing conditions would not account for the localizing and the tubercle bacilli, but would aggravate the conditions and make the patient susceptible to the development of tubercle bacilli; that dust will irritate the bronchial tubes; that the germs produce inflammation and that produced bronchitis. He said that dust would serve as a raft to carry germs up; that the germs were so small they do not float in the air, but float on all dust particles, and if you inhale the dust that contains infectious organisms you get infection; that if the number of germs is very great, our blood cells are obliged to destroy these by producing immune bodies, and there is a limit to which immune bodies can be produced. In consequence of that, if we get an overwhelming number of germs in the lungs, resistance is lowered,

because, following that, there is a period of exhaustion, and during that period of exhaustion no anti-bodies are produced against the tubercle bacilli, especially an infection like pneumonia or like measles, that creates a great demand for anti-bodies. If a man has the germ to cause bronchitis and inhales a lot of dust that makes him cough, he might drive out a lot of these germs and irritation in the bronchial tubes; that if the germs are simply lodged on the surface of the bronchial membrane, it might make him cough and drive out enough of the germs so that he might easily take care of the rest, and in that way the inhalation of dust could be beneficial.

The appellant contends that the verdict of the jury was based on a mere guess or conjecture that the tuberculosis from which plaintiff suffered was caused by the negligence alleged in the declaration; and it further contends that a germ disease is not the result of an injury, although the injury may have caused a lowered resistance and thus render the injured person more susceptible to the disease. If the verdict of the jury is based on mere guess or conjecture, it cannot stand. Neither courts nor juries have a right to guess away defendant's money. The burden of proof is at all times upon the plaintiff, and he must show by a preponderance of the evidence a duty resting upon defendant, which duty was owing to the plaintiff; that the defendant neglected to perform the duty; and that such neglect was the proximate cause of the injury for which plaintiff sues. In this case the duty is admitted. The negligent failure to comply with the provisions of the statute are also admitted, and the injury, viz. the development of the tuberculosis, is established beyond a reasonable doubt.

It must be conceded, we think, to be proved as a

fact that the emery wheels upon which plaintiff worked produced dust, which by reason of defendant's neglect to comply with the statute was not blown away, but on the contrary found its way into plaintiff's mouth and nostrils. While there was a sharp conflict in the evidence on this point, it must be regarded as settled in plaintiff's favor by the verdict of the jury.

The sole remaining question is whether the negligence established was the proximate cause of the injury. Defendant says that a germ disease is not the result of an injury, although the injury may have brought about a lowered resistance and thus rendered the injured person more susceptible to the disease. We do not understand such to be the law of this State. In several cases it has been held that an injury which makes possible a subsequent disease by lowering the plaintiff's powers of resistance may, if the jury so finds, be the proximate cause of the disease. In Hayward v. Metropolitan Ry. Co., 174 Ill. App., 408, the court said:

"The testimony that the tubercular condition presented itself so long after the accident, seems to raise a doubt as to its being a result thereof, but had a tubercular condition appeared shortly after the accident, would not some doubt also arise as to its being caused thereby? *** In view of the rule prevailing in this State that it is a question of fact for the jury, and taking into consideration all the circumstances of the case, including the remoteness, we are not inclined to disturb the verdict, and the judgment will be affirmed."

In Chicago City Ry. Co. v. Bazby, 213 Ill., 274, a case in which it was claimed that an injury had resulted in tuberculosis, the court said:

"If, however, it be conceded that she had tuberculosis in her system, and that the same was developed in the knee by reason of the injury thereto, or from the treatment she received in the endeavors made to effect a cure of the fracture of the neck of the femur, we think it cannot be said that the diseased condition of the knee was not a consequence which naturally and ordinarily might follow as a result of the injury of appellee, caused by the negligent act of appellant."

The court further said:

"The question whether or not the injuries of the appellee were the result of the negligence of appellant or resulted from disease or a tendency to disease, was a question of fact, and as there was evidence in the record which fairly tended to show that the injuries which the appellee was suffering from were the result of her being thrown from appellant's car, we are of the opinion that the trial court did not err in declining to take the case from the jury, even though the injuries of the appellee were aggravated by the fact that she had in her system an organic tendency to tuberculosis, which was developed by the injury or the treatment applied to the injury by the physicians, and which retarded or prevented a complete recovery."

The cases upon which appellant relies are distinguishable by the fact that the diseased condition was not connected up with the injury by competent medical testimony, as it has been here. Appellant cites Gray v. Chicago & N. W. Ry. Co., 142 N. W., 505, and quotes from the opinion rendered by the Supreme Court of Wisconsin in that case; but, as a matter of fact, the court allowed in that case a recovery for tuberculosis, and in the course of the opinion it said:

"Dr. M. J. Donahue, who treated plaintiff for his injuries from the day of the accident in January, 1911, until some time in April following, and gave him a thorough physical examination, *** testified directly as follows: 'Such an injury as the one he sustained would cause tuberculosis; it would decrease the resisting forces, tend to give a chance for infection, and give it a chance to loom up; in other words, this germ that is dormant or inactive, would or can become active. In my opinion the tubercular condition that I found is the result of this injury.***' We are unable to say that this testimony is beyond the proper scope of expert medical testimony, and unless we can say that, it seems certain that we cannot hold that a finding that the tuberculosis condition was caused by the accident, is purely conjectural."

These are only a few of the cases cited in the briefs, which so hold.

Appellant's contention seems to be based on the theory that there could be only one proximate cause of plaintiff's disease. If that were true, the argument advanced would be a plausible one; but we do not understand that it was necessary for plaintiff to prove that the negligence of the defendant was the sole and only cause of plaintiff's tubercular condition. On the contrary, we understand that it was only necessary to show that

it was one of the efficient causes tending to produce that result.

It is established without contradiction that plaintiff was free from this disease at the time he began to work on the emery wheel. There are two causes by which, under the medical testimony in this record, the tubercular condition may have been brought about. These two causes are the dust inhaled and plaintiff's mode of living. For the one cause the defendant would be liable; for the other, it would not. That this was the view of the jury is, we think, apparent from the amount of the verdict. The proposition that the proximate cause is not necessarily the only cause, is, we think, established by a large number of cases. American Express Co. v. Halsey, 179 Ill., 205; Siegel Casper & Co. v. Trcka, 218 Ill., 589; Washburn v. Kelly Coal Co., 245 Ill. 616; E. A. & S. Tr. Co. v. Wilson, 217 Ill., 47.

We cannot say that the verdict of the jury is against the manifest weight of the evidence, and the judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

Journal of Management Studies, 19(1), 67-80.

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369 - 37327

MARY TOOD,

Appellant,

vs.

NATIONAL LIFE INSURANCE
COMPANY OF THE UNITED
STATES OF AMERICA, a
Corporation,

Appellee.

226 I.A. 688

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is a case where plaintiff, who appeals, sued as beneficiary on an insurance policy issued by defendant. Plaintiff's statement of claim alleges the sickness and subsequent death of the insured (her husband) on June 15, 1931; that due notice and demand had been made on the defendant for the death benefit provided by the policy, but that defendant refused to pay. Plaintiff's affidavit attached to the statement of claim states that the sum of \$94 is due. The cause was tried by the court and the finding was against the plaintiff, and judgment for costs against her was entered on the finding. The policy upon which suit was brought provides: "Benefits will be paid for sickness or death resulting wholly or in part, directly or indirectly, from any venereal disease ~~xxxx~~."

After the death of her husband plaintiff procured a blank from the defendant company, and submitted several documents in support of her claim. One of these was the physician's certificate of death. This was offered in evidence by the plaintiff, without reservation of any kind; it is signed by the attending physician, C. C. Erickson, and is sworn to by him. It states that the cause of death given on the death certificate, was bacillary Transverse Myelitis; the contributory cause Pyelonephrosis and Myocarditis.

In response to the questions, "Was the direct or

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THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D. C. 20250

In response to the question, "Was the object of

contributory cause chronic?" the answer was "Yes." "Venereal?" Answer, "No." "Venereal?" Answer, "Yes." In the claimant's certificate of death, in response to a question as to the cause of death, plaintiff replied, "Acute Transcathene myocardia."

No other evidence was offered by the plaintiff tending to show the cause of death. Defendant offered in evidence the medical certificate of death, signed by the Registrar of Vital Statistics, together with certain health ordinances of the City of Chicago, by which the Health Department of the City of Chicago was established, the office of Commissioner of Health created, and power given to appoint assistants and employees, including a Registrar of Vital Statistics, and stating his duties, including that of keeping a record of births and deaths. This was the only evidence submitted by the defendant on this controlling issue of fact as to the cause of the death of plaintiff's husband.

Plaintiff objected to the introduction of the medical certificate, not only on the ground that it was not competent evidence, but also upon the ground that it was not certified as provided by law. These objections were overruled, and appellant argues here with much earnestness that the court erred in this ruling. As the cause was tried by the court, without a jury, the ruling, even if erroneous, would not constitute reversible error if there was other evidence in the record sufficient to sustain the finding.

The only defense here interposed was that the death of the insured was directly or indirectly, in whole or in part, due to venereal disease, and that important issue of fact seems to be settled against appellant's contentions, in respect of the ^{certificate of the} Registrar of Vital Statistics, by the proofs of death submitted to the defendant company by the beneficiary, and by her offered in evidence.

In the recent case of Hill v. Modern Woodmen of America,

231 Ill. App., 345, the court states the law applicable as follows:

"Under the law as laid down by the Supreme and Appellate courts of this State, the statement of a beneficiary under a benefit certificate or insurance policy, and also the statement of the physician as a part of the proofs of death, are competent evidence in a suit brought by the beneficiaries to recover on the policy."

See also Modern Woodmen of America v. Davis, 164 Ill.

236, affirming 64 Ill. App. 439; Culter v. Travelers Protective Association, 144 Ill. App., 256; Helwig v. Mutual Life Ins. Co. of N. Y., 132 N. Y., 331.

Plaintiff's own evidence, we think, therefore shows that the cause of death was Luetic Transverse Myelitis, and therefore that the cause, directly or indirectly, was venereal disease. Appellant says that we cannot take judicial notice of the meaning of the phrase Luetic Transverse Myelitis, and that, as there is no evidence before the court as to the meaning of that term, the finding should have been for the plaintiff. The court will always take judicial notice of the meaning of ordinary words and phrases which have become a part of the language, and as our language is a living, growing one, this necessarily means that the judicial horizon, as well as that of the common people, is constantly widening. See State v. Mc. Pac. Ry. Co., 212 Mo., 683. A word or phrase which has a definite and established meaning in the English language will be judicially noticed. Bureau Y. Co. v. Gazette P. Co., 35 Fed. 570; State v. Halpin, 35 Kas. 1. Luetic means syphilitic.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

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379 - 27337

CHARLES A. CARLSON,

Appellee.

vs.

LOUIS HUGH,

Appellant.

226 I.A. 630

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for plaintiff in the sum of \$225.63 entered upon the verdict of a jury, motions by defendant for a new trial and in arrest of judgment having been over-ruled.

Plaintiff's statement of claim alleged that on August 13, 1917, he was driving his automobile on North avenue and Orchard street, in the City of Chicago, County of Cook and State of Illinois, and the defendant then and there operated another automobile so negligently and carelessly, in violation of the city ordinances and statutes, that as a result thereof, plaintiff's automobile was broken and damaged. To this statement of claim, defendant filed a plea of not guilty.

As cause for reversal appellant contends that there is no proper evidence in the record upon which to base the amount of the judgment, because, he says, the evidence of one Hoskins, who testified to the cost of making repairs upon the damaged automobile, was inadmissible. The evidence showed that Hoskins had immediate supervision of the work which was done and of the repairs made upon the automobile, and his evidence was therefore competent and admissible. Francis Peabody v. Lynch et al., 184 Ill. App. 78.

Again appellant says that there is no evidence in the record tending to show that the accident happened in the State of Illinois, that there is no presumption that it happened in

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This is an appeal by the defendant from a judgment of the District Court of the Southern District of New York, entered on November 14, 1963, in Case No. 63-10000, wherein the defendant was convicted of a crime and sentenced to a term of imprisonment.

The defendant's statement of reasons for appeal is that he was denied the right to a fair trial, and that the evidence against him was insufficient to sustain the conviction. He claims that the jury was improperly instructed, and that the evidence against him was insufficient to sustain the conviction. He claims that the jury was improperly instructed, and that the evidence against him was insufficient to sustain the conviction. He claims that the jury was improperly instructed, and that the evidence against him was insufficient to sustain the conviction.

It is requested that the Court set aside the judgment of the District Court and grant the defendant a new trial. The defendant claims that the evidence against him was insufficient to sustain the conviction, and that the jury was improperly instructed. He claims that the jury was improperly instructed, and that the evidence against him was insufficient to sustain the conviction. He claims that the jury was improperly instructed, and that the evidence against him was insufficient to sustain the conviction.

that State, and that instructions applying the Statute Law of Illinois to the facts of the case were therefore erroneous. While there was no direct evidence that the accident happened in the State of Illinois, we think there is proof which does not leave us in ignorance in this respect. The evidence shows that the accident occurred at the intersection of Orchard street and North avenue, and one witness states: "We came through Lincoln Park and then went west on North avenue." We can take judicial notice of the fact that Lincoln Park is located in Cook County and in the State of Illinois and the evidence shows the accident was near Lincoln Park and in a closely built up portion of the city.

It is also urged that one of the instructions given at the request of the plaintiff is erroneous in that it presents in a negative manner the duty of the plaintiff to use ordinary care. While we do not think the instruction justly subject to the criticism, it appears that a similar instruction was given to the jury at the request of the defendant, and defendant, therefore, cannot be heard to complain on this ground.

Appellant also says that the plaintiff was guilty of contributory negligence, and that the verdict of the jury was manifestly against the weight of the evidence. The evidence tends to show that the automobile of plaintiff was injured when struck by defendant's automobile at the intersection of Orchard street and North avenue, near Lincoln Park, August 13, 1917. Orchard street is a public highway, extending north and south. North avenue is a public highway extending east and west. Plaintiff was driving his automobile in an easterly direction on the south side of North avenue. When he reached Orchard street he turned north into it, at the center of the street. Defendant's automobile was then going west in the car track on North avenue,

and at a speed which witnesses for the plaintiff estimated at from thirty to forty miles an hour; defendant's automobile struck the front side of plaintiff's machine. As against this evidence for the plaintiff, defendant gave evidence tending to show that as defendant's car approached on North avenue, plaintiff's machine suddenly shot forward in front of it and was struck.

We think the questions as to the alleged negligence of the one, and the alleged contributory negligence of the other, were, under these circumstances, for the jury, and we cannot say that the verdict is against the manifest weight of the evidence. The judgment is therefore affirmed.

AFFIRMED.

McCurley, F. J., and Dever, J., concur.

L. S. WHITTON,
Appellee.

vs.

ANTON BLAU,
Appellant.

226 I.A. 63

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of \$437 entered upon the verdict of a jury, after motions for a new trial and in arrest of judgment had been overruled. The plaintiff's "more specific" statement of claim alleged that he was a painter, and that his claim was ^{for} certain painting, papering and calcimining work which he did for the defendant; that the work was commenced June 17, 1915, and finished April 15, 1916. He claimed a balance due on account of the three buildings, which he had agreed to paint at the price of \$225 a building, amounting to \$675; and a balance of \$164.85 was claimed for extra work alleged to have been done, and extra material, etc., furnished to the defendant.

The affidavit of merits set up by way of defence that the plaintiff abandoned the work which he agreed to do; that defendant was compelled to complete the same at considerable expense; that the defendant was the owner of the articles mentioned in plaintiff's more specific statement of claim; that the plaintiff did not do some of the extra work for which he claimed compensation, and as to other parts of it, he had been fully paid. Defendant denied that he was indebted to the plaintiff in any sum whatever.

Errors assigned and argued are that the verdict and judgment are against the weight of the evidence, and that the

LEAD ARTIST

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Source: The International Institute of Statistics, *Handbook of Statistics*, 1992, p. 104.

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and the other is the same as the one in the first case.

Not applicable if less than 100% for subordinates, otherwise a 100% is entered

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For planning, it is important to know a 'Vollmacht' is a power of attorney.

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court admitted incompetent evidence over the objection of the defendant. The evidence admitted of which the appellant complains, was that tending to show what the usual and customary wages for painters and decorators were in Chicago, in the years 1915 and 1916. It was objected at the trial and is now urged that this evidence is inadmissible, because plaintiff's suit was on a contract for an agreed price, citing Fessler Company C. A. Co. v. Darrow, 172 Ill. 62. Apparently, however, during the first part of the trial, the defendant did not admit the existence of an express contract and, moreover, a part of the defense was that the work had been abandoned, and the defendant had been obliged to hire another workman to finish it. This evidence was therefore admissible upon that point, even if it should be conceded that it was not admissible for any other purpose.

As to the ultimate facts in issue, we think there was evidence from which the jury could reasonably find that as to the three buildings, there was an express contract between the parties, and as to the other items, that there was, as to some of them, an express, and to others, an implied promise to pay. The defendant testified. He did not deny that the extra work claimed for, was done at his request, with the exception of one item for marbling certain dados. The plaintiff claimed for this item the sum of \$32, which the jury properly disallowed.

On the issue of fact as to whether the plaintiff abandoned the work, the overwhelming preponderance of the evidence shows that he did not abandon it, but, on the contrary, that he was wrongfully driven off the job, defendant striking him at the time and calling him a foul name.

Evidence was introduced by the defendant, tending to show that some of the work had been done improperly, but other evidence tended to show the contrary, and we are not able to say that the jury was not justified in finding for the plaintiff on that point.

The real question on the merits seems to be whether plaintiff or defendant had paid for the material used in doing the work. (The evidence on this point was conflicting.) It was fairly put up to the jury, and we see no reason for disturbing its verdict. Indeed, we think it very doubtful, whether some of the evidence introduced on defendant's behalf should have been permitted to go to the jury.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

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KRIEHEL & COMPANY,
a corporation, Appellee.

vs.

THE ALLEN FILTER SERVICE,
a corporation, Appellant.

2261A. 639

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of \$397.25, entered upon a finding by the court. The statement of claim alleged that on June 30, 1920, plaintiff purchased from defendant a water cooler and filter with faucet attached thereto, which was by agreement to be installed by the defendant in the premises of plaintiff, and that defendant so carelessly, negligently and improperly installed the same, and that, when installed, it was so defective in its manufacture, construction and installation, that the same leaked; that great quantities of water escaped therefrom in the nighttime upon the floor of the premises, and ran down and upon the floor of persons located under and beneath the plaintiff's office, injuring property belonging to them, for which damage plaintiff was obligated to and did pay. The defendant filed an amended affidavit of merits, in which it admitted the purchase and installation, but denied that the same was improperly installed; denied that the filter and cooler was defective in its manufacture, construction or installation; denied that it leaked or that the water escaped and injured the property of others as alleged. It also denied that plaintiff had paid damage as alleged, and denied that any damages sustained by plaintiff were the result of defendant's negligence.

This affidavit also said that the water cooler was

SSA A. 033

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sold and installed with full instructions to the plaintiff as to the operating and cleaning of it; that plaintiff was to give a report in writing immediately thereafter if such filter should not give entire satisfaction, and that if a written report of this kind was not received, it should be taken that the filter and cooler was entirely satisfactory. Further, that defendant was to repair and replace all mechanical defects, when notified by the plaintiff, but was not to be held responsible for damages because of leakage or breakage occasioned by use or misuse. A copy of the alleged contract was attached to the amended affidavit.

From the evidence taken we think the court could properly find that defendant was a manufacturer and vendor of a certain water filter and cooler; that on June 30, 1930, plaintiff, through an employe, purchased from defendant one of these articles which was installed by defendant's servants in the office of plaintiff; that the office was located on the fourth floor of a building situated at 16 West Jackson street, Chicago; that the cooler was ordered by 'phone and was installed July 8th thereafter; that on that date the plaintiff's employe signed a receipt which stated that it acknowledged the delivery and satisfactory installation, with other conditions as set up in the affidavit of merits; that on the 6th day of August after its installation, plaintiff paid the full purchase price therefor; that a few days thereafter, upon opening the office in the morning, plaintiff's employes found that the cooler had overflowed; that the whole floor was covered with water, and that the water was running in on the third floor.

It is stipulated that the occupant of the third floor was damaged to the amount of the judgment, and the uncontradicted evidence shows that plaintiff paid to him that amount. Defendant's office was called by 'phone, and notified of the overflow, and a

man familiar with the construction of the cooler was sent to plaintiff's office. This was on Saturday. On the following Sunday another employe was sent, who examined the article and took it apart. The first employe made a report to defendant but was not produced as witness at the trial. The second testified. A picture of the filter and cooler appears in evidence. It appears to be constructed in the form of a square. It has two chambers supported by a wall. One of the chambers is used for ice, the other is filled with water which it is desired to cool. The two chambers have a common cover, and the wall between does not extend quite to the top. The cooler was attached to the water main from which water flowed into the water chamber. The cooler was so constructed that this water was admitted or cut off by an automatic shut-off or float valve. If the valve failed to work an overflow of the water into the ice chamber was sure to result. A bucket at the time in question was placed under the cooler to catch any such overflow, and after the accident, defendant installed a drain pipe which would catch any such overflow and carry it to the sewer or outside building. As the cooler was originally installed, the prevention of an overflow depended entirely upon whether the automatic shut-off should properly perform its designed function, and there was evidence from which the court might properly find that there was a defect in it, as constructed and installed.

Testimony was given to the effect that when examined by defendant's employe, it was found to be "stuck", and that after the workmen had unscrewed and loosened it, it functioned properly. There is some contradiction in the evidence on this point, but we cannot say that the finding of the court in this respect is against the manifest weight of the evidence.

Appellant has presented a brief of points covering twenty-two pages in support of which it presents an argument of five pages. Many of the points made are not, we think, applicable

THESE ARE THE RESULTS OF THE INVESTIGATION OF THE CASE OF THE
MURDER OF THE LATE PRESIDENT OF THE UNITED STATES, ABRAHAM LINCOLN,
AND OF THE ASSASSINATION OF THE LATE PRESIDENT OF THE UNITED STATES,
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INVESTIGATION OF THE CASE OF THE MURDER OF THE LATE PRESIDENT OF
THE UNITED STATES, ABRAHAM LINCOLN, AND OF THE ASSASSINATION OF
THE LATE PRESIDENT OF THE UNITED STATES, JACKSON, ARE AS FOLLOWS:

to the facts of the case, and those not argued, are, under a familiar rule, presumed to have been abandoned. The case was brought in the Municipal Court, and the form of action is there immaterial. It matters not whether the action is regarded as one in contract or in tort. Relfs v. Peckley P. Co., 176 Ill. App. 93; Fisher v. Tauber, 174 Ill. App. 436; Burns v. Shoe-maker, 172 Ill. App. 390. Whether, if the plaintiff had made a proper motion the statement might have been stricken, because of its double aspect, it is not necessary for us to decide, as no such motion was made; but whether we consider the claim as based on an implied warranty that the article sold, was reasonably fit for the use for which it was intended, or a simple case of negligence, we think the court might properly under the evidence on either theory, find the defendant liable.

The sale was made by 'phone and not by a written contract. The employe of the plaintiff distinctly stated at the time of the purchase, that payment would be made in cash rather than in instalments, for which the supposed written agreement provides. After the article was installed this employe signed a receipt without reading it, and this receipt contained provisions with regard to the terms of the sale, on which defendant now relies. We do not think that under the circumstances the plaintiff is bound thereby. It clearly was not the intention of both parties that this receipt should constitute a written contract. Section 13 of The Uniform Sales Act, Cahill's Illinois Revised Statutes, 1921, page 3086, provides in substance that where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods were required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not) there is an implied warranty that the goods shall be reasonably fit for such purpose. There could be no doubt here that the seller was informed and knew the use to which the

[illegible]

article bought was to be put, and that there was, therefore, an implied warranty that the thing sold was reasonably fit for the purpose for which it was to be used. It was not reasonably fit for that use, and we think the defendant was therefore liable on its warranty.

The defendant contends that at any rate its negligence is not the proximate cause of the damage. That such damage would probably result from the defect proved by the evidence, we think any reasonably prudent person might have foreseen. These damages were the natural and probable effect of such defect, and the defect was therefore the proximate cause.

Defendant also argues that plaintiff was negligent in that it allowed the water to flow to the lower floor, but there is no proof of any negligence on the part of the plaintiff, except such as it may have been liable for to the occupant of the third floor, by reason of defendant's breach of its warranty and negligence. The judgment will therefore be affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

418 - 27376

HANFORD CORP.,
Appellee,

vs.

SCHIFF & COMPANY BANK,
a Corporation,
Appellant.

226 I.A. 639
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the sum of \$235 entered on the verdict of a jury in favor of the plaintiff. Plaintiff's statement of claim alleged that he purchased from the defendant 1,000 rubles, and that defendant agreed to make delivery of the same in from four to six weeks; that plaintiff had repeatedly demanded either the delivery of the rubles or the return of his money, but that defendant had failed to do either.

The affidavit of merits denied that plaintiff purchased the rubles for immediate delivery and denied that plaintiff had made demands as alleged, but stated the facts to be that on or about August 15, 1917, plaintiff delivered to defendant the sum of \$235, and requested defendant to act as the plaintiff's agent for the purpose of forwarding 1,000 rubles to Habet Rovabowicz Kogan at Moscow, Russia; that at the time plaintiff paid said money and requested the defendant to act as his agent, plaintiff and defendant entered into a written agreement, a copy of which is set up.

The appellee has not appeared in this court in support of the judgment entered in his favor. We have nevertheless examined the evidence carefully, and think the contention that the judgment is clearly and manifestly against the preponderance of the evidence

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must be sustained. The judgment is therefore reversed and the cause remanded.

REVEREND AND HONORABLE.

McSurely, P. J., and Dever, J., concur.

435 - 27393

226 I.A. 640

FRANK ONDRACEK,
Appellee,

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

vs.

JOSEPH CHMIELINSKI,
Appellant.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of \$900, entered upon the finding of the court. The facts (for the most part stipulated) are practically as follows. The defendant (appellant in this court) is the owner of certain premises situated in the City of Chicago, known as No. 1618 West 18th street. June 24, 1918, he made a lease in writing by which he demised these premises to one Gus Marculis, for a term ending June 30, 1923. The premises were designed for use as a theatre, and the lease included certain property in the building situated thereon, which was suitable for that purpose. The rent reserved was \$130 a month and the lease provided that to insure the faithful performance of all the covenants and terms thereof "the party of the second part agree that the two electric moving picture machines to be installed in said premises by the party of the second part, shall be security, and cannot be removed from said premises without permission of the party of the first part."

On July 23, 1918, one John A. Voumvakis purchased from the Enterprise Optical Manufacturing Company two motiograph machines with motor, etc., and the same were delivered to him at the above mentioned premises. He paid part of the price in cash and executed a chattel mortgage securing the balance. This mortgage was never recorded.

3261.A. 810

UNITED STATES
DEPARTMENT OF AGRICULTURE
WASHINGTON, D. C.

OFFICE OF THE
DIRECTOR
WASHINGTON, D. C.

TO THE DIRECTOR, UNITED STATES DEPARTMENT OF AGRICULTURE
FROM THE DIRECTOR, UNITED STATES DEPARTMENT OF AGRICULTURE
SUBJECT: [Illegible]
[The following text is extremely faint and largely illegible due to the quality of the scan. It appears to be a memorandum or report detailing agricultural matters, possibly related to the "UNITED STATES DEPARTMENT OF AGRICULTURE" header. The text is organized into paragraphs and includes dates such as "July 10, 1918".]

April 2, 1919, thereafter, Voumvakis paid the balance due on the purchase price of these machines; March 22, 1919, Voumvakis sold to the plaintiff, Frank Ondracek, the contents of the operating room of the motion picture theatre, located at this place. The theatre was known as the "White Eagle Theatre." The conveyance covered "all tools, implements, two motiograph machines, outside electric equipment, and all other paraphernalia belonging thereto, in the one-story brick building at 1618 West 18th street, Chicago, Illinois, including the good will of said business."

Ondracek paid Voumvakis \$1,100 therefor, and took a bill of sale covering the property. An amusement license had been issued to Voumvakis by the City of Chicago January 27, 1919, which license gave him the privilege of conducting a theatre on the premises. This license was to expire June 30, 1919. On that day the plaintiff Ondracek went into possession of these premises and property, but took no assignment of the written lease. Although it was in dispute, we think, as a matter of fact, the court was justified in finding that Ondracek paid to the defendant, and defendant received from him, rent for the premises at the rate of \$130 a month, during the months of April, May and June, 1919. June 26, 1919, the defendant took judgment against Marculis for the sum of \$130, being the rent at \$130 a month for the month of June, 1919, and \$20 attorneys' fees. An execution issued on June 27th thereafter, and on July 3, the bailiff of the Municipal Court levied on the goods and chattels in controversy, being the same property purchased by Voumvakis, and on August 7, 1919, sold the same to the defendant for \$200. June 30th the defendant took possession of the goods and chattels involved, directed the plaintiff to leave the premises, and locked the door, placing a padlock thereon. Plaintiff at that time remonstrated and demanded possession of the goods, which was re-

fused, and on July 1, through his attorneys he again demanded in writing the return of the goods, which was again refused. It is stipulated that the value of the goods in controversy on June 30, 1919, was \$700. Plaintiff thereafter sued out a writ of replevin for the goods, and the same not having been recovered on the writ, filed a count in trover.

The defendant requested the court to hold as propositions of law that defendant came into possession of the property lawfully, and that a demand was necessary before plaintiff could maintain an action in replevin or trover for the goods; that plaintiff was not a tenant of the defendant, and that plaintiff was in law estopped from asserting his rights to the property because he did not give notice to the officer at the time of the levy of his claim to ownership of the goods.

We think the court did not err in refusing to hold these propositions of law. Defendant took the property with full notice of plaintiff's rights, and drove plaintiff away from the premises prior to the levy. There is no proof that plaintiff had notice of the bailiff's sale or prior knowledge of it. There was, therefore, no basis for an estoppel. The finding of the court was correct and the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

RICHARD H. PETERSON, Appellant,

vs.

THOMAS H. HARNEY, GEORGE W.
PLUMMER and JAMES H. BURKE,
jointly and severally, Appellees.

225 I.A. 640
APPEAL FROM

CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment in favor of the defendants, entered upon the verdict of a jury, which verdict the court, on motion of defendants, instructed the jury to return. The action was in case. There are three defendants, and the declaration in several counts alleged that defendants with malice and without probable cause, procured a warrant, charging the plaintiff and others with conspiracy to extort money from one Harney; that upon the hearing, the defendant there (plaintiff here) was discharged. The declaration also alleged that defendant Burke, who was a police officer of the City of Chicago, acted with malice and executed the warrant in an unnecessarily oppressive manner. The defendants each filed pleas of the general issue. The abstract is quite deficient, and two of the defendants have not seen fit to appear in this court in support of the judgment entered in their favor.

The error urged is the giving of the instruction to the jury to find for the defendants.

The evidence of the plaintiff tended to show that he was an attorney at law in this State, and had been practicing law in the City of Chicago for twenty years; that he had an office in Chicago, but his home was in Evanston; that he was well acquainted with defendants Harney and Plummer; that Plummer is also an attorney at law, practicing in this State; that

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that Harney was reputed to be a member of a firm known as Harney Brothers, who were engaged in the commission business in the City of Chicago; that certain farmers claimed Harney Bros. sold hay belonging to the farmers on a commission, and received the proceeds thereof, but refused to pay the farmers for the hay received and sold; that three Harney Bros. there, including the defendant, occupied the same building, and that the only name on the door of the office and on the doors downstairs was "Harney Brothers;" that the plaintiff represented as an attorney, several of these farmers, who made claims against Harney Bros. and that, as their attorney, he brought suit against Harney Bros. on these claims; that one of the parties, who claimed to have been thus defrauded out of his hay by Harney Bros. consulted plaintiff, who told him that he, plaintiff, had advised with the State's attorney of Cook County, who had told him that the acts done by these people were in the nature of a confidence game; that this party thereupon went before a judge of the Municipal Court, and made a complaint, whereupon the judge issued warrants; that the defendants in that case then went before Judge Barosa, who entered an order quashing the warrants; that thereupon, upon complaint made, warrants were issued by Judge Barosa for the plaintiff and others on the charge of conspiracy to extort money from Thomas W. Harney; that although the plaintiff was at his office each day thereafter, the defendant, James W. Burke, who is a police officer of Chicago, came to the house of plaintiff in Evanston, accompanied by an Evanston policeman, at about ten o'clock at night, and served the warrant on plaintiff; that plaintiff explained to this police officer that his wife was ill and aged, and that she was shocked by this occurrence; that the Evanston police officer refused to have anything to do with the arrest, but that defendant Burke by superior force and power compelled the plaintiff to come along with him, and took him to the central station in Chicago, where he was

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held until he secured a bond; that defendant Burke demanded of the lockupkeeper to put the plaintiff in a cell, but the lockupkeeper said "No, sir, I will not have him put in a cell," and further said, "You take an old man like that and bring him here, I will be responsible for him. Sit down here until your bond is approved." Plaintiff says that he remained there until two o'clock next morning, when he was released on bond, and got back to his house about three o'clock the next morning; that after several hearings he was discharged by Judge Hayes, who said: "There is not a word of evidence against them."

Plaintiff says that his arrest was published in all the city newspapers, and all his friends knew about it, and many of them spoke to him about it.

We think the evidence for plaintiff made a prima facie case, which should have been submitted to the jury, and that it was error for the court to direct a verdict in favor of the defendants. The judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, F. J., and Dever, J., concur.

of the Estate of A. M. Scott, deceased,

Appellee,

vs.

E. W. DeBower and JOHN D. MORRIS,
Appellants.

226 I.A. 640

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MR. JUSTICE LATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, as administrator of the Estate of A. M. Scott, sued the defendants upon five promissory notes for the sum of \$200 each, dated October 30, 1916, at Philadelphia, and payable to the order of the deceased upon the dates named in the respective notes, with interest at 6 per cent. per annum. The declaration filed was the consolidated common counts. The defendants filed an affidavit of merits, which was stricken from the files, whereupon an amended affidavit was filed which set up that the notes had been fully paid to A. M. Scott; that Scott and DeBower entered into a verbal agreement that if said E. W. DeBower would deliver to Scott \$5,000 par value of the common stock of the Line Drive Tractor Company, Scott would cancel and surrender the said notes; that DeBower delivered said stock according to the agreement, but that Scott, although requested so to do, did not cancel and surrender the notes.

The cause was tried by the court without a jury, and the court found the issues for the plaintiff, assessed plaintiff's damages at the sum of \$1377.50, and entered judgment therefor.

The defendants asked the court to hold as a proposition of law that if plaintiff's intestate had made the agreement as alleged, and DeBower gave and delivered to Scott the shares of stock agreed upon, plaintiff was not entitled to recover in the case, even if Scott neglected or failed to cancel the notes

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and surrender them to DeBower. The court refused to hold this proposition of law. We think it should have so held, but this ruling becomes immaterial if the facts in evidence fail to sustain the proposition as stated.

The controlling question in the case therefore is, whether the judgment is manifestly against the preponderance of the evidence. Appellant argues that it is.

The evidence submitted on behalf of the plaintiff consisted of the uncanceled notes, which were in the possession of the administrator, were produced by him and offered and received in evidence. In order to sustain the defense as pleaded, the defendants then produced as a witness one Glen C. Ball, who testified that he knew plaintiff's intestate in June, 1917, and was present at a conversation between the intestate and E. W. DeBower at DeBower's office in Chicago, in June, 1917; he was unable to fix the exact date. He says that Mr. Scott came in and said he had been thinking over the Line Drive Tractor, and was very much interested in it, and would like to increase his holdings, and said, "Those notes" - or "note of \$1,000 that I have of yours and Mr. Morris' in the outgrowth of the Harconela affair" - in which the three men were jointly interested in Philadelphia - that he would like to surrender the notes to Mr. DeBower for \$5,000 common stock in the Line Drive Tractor. He further testified that DeBower said he would think it over and let him know in a few days. The witness also testified that he was present on a like occasion, at which Mr. Scott again brought the proposition up, and DeBower stated that he was inclined to accept it; that he would have the stock certificates made out, and he ordered Miss Cranner, his secretary, to make them out. The witness also says that the certificates were made out and delivered to Mr. Scott, and that Scott stated that the notes were not avail-

and therefore that it is not possible to say that the
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able, but were in the safety deposit box or some place where he could not get them; that he would get them and send them over to Mr. DeBower. This witness also testified that DeBower inquired about the notes two or three times, and finally became impatient and told Scott that the stock had been delivered to him; that he wanted the notes, and that Scott told DeBower that he "would get them all right, he did not need to worry about them or something like that." The witness was unable to remember how many conversations there were about the notes, but says that on one occasion when DeBower had made a demand for the notes there was a little friction between DeBower and Scott, and that Scott made a statement to the witness that he would "wait until he was good and ready to turn the notes over, or something to that effect." Witness says that Miss Grannon was not present at this time, but that the statement was made to the witness in the hall and in confidence. The witness said he had never talked to Miss Grannon or anybody except Mr. Arnd, the attorney, about his testimony in the case.

Miss Grannon also testified for defendant that she recalled a conversation having taken place in June, 1917, but was also unable to fix the exact date. She says that Scott, Mr. Hull and Mr. DeBower were present at that time; that while discussing other matters Scott got to talking about some notes, and said to Mr. DeBower, "Well, I would like to get some more Line Drive Tractor stock. Maybe we can make a deal on some Line Drive Tractor stock." Mr. DeBower said, "Maybe we can do that," and asked what Scott thought would be a good deal. "He suggested I believe, it was 50 shares of stock at a par value of \$100 per share, \$5,000, and Mr. DeBower said that was too much." She says he stated further he would give it consideration, and that on another day Scott came back and asked Mr. DeBower if he had

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the nineteenth century. The process of urbanization is the movement of people from rural areas to urban areas. This movement is caused by a number of factors, including the search for better living conditions, the desire for education, and the need for employment. The process of urbanization has led to the growth of large cities and the decline of small towns. This has had a number of effects on the United States, including the concentration of wealth and power in the hands of a few people, the loss of traditional values, and the increase in crime and social problems.

THEY STAYED IN THE HOUSE FOR THE FIRST TWO DAYS OF THE WEEK, BUT ON THE THIRD DAY THEY WENT OUT TO THE GARDEN AND SAW A VERY LARGE AND OLD TREE WHICH WAS FULL OF APPLES. THEY WENT UP TO IT AND TOOK SOME OF THE APPLES AND ATE THEM. THEY WERE VERY TASTY AND THEY ENJOYED THEM VERY MUCH. THEY WERE VERY HAPPY AND THEY WENT BACK TO THE HOUSE AND ATE THEM AGAIN. THEY WERE VERY HAPPY AND THEY WENT BACK TO THE HOUSE AND ATE THEM AGAIN.

given any more thought to the stock matter, and DeBower said he had, and "I guess I will take you up on that." This witness also says that she was present when the stock was turned over to Mr. Scott; that DeBower then asked Scott for the notes; Scott replied that they were in his vault, and that he would give them to him some other time. She further says that on two or three occasions DeBower asked Scott for the notes and that each time Scott gave some excuse. The witness says that she afterwards became Scott's private secretary; that Scott's office adjoined DeBower's office, and that she was present on a couple of occasions when DeBower came in to ask for the notes and that Scott invariably responded that they were in the vault and that he would get them in a few days. She also says that on one occasion, after DeBower went out, Scott turned to Mr. Hull and said that he would see how the stock turned out before he turned the notes over.

The plaintiff administrator testified that he had made a search through Scott's papers in order to determine the amount of the assets, and that the only Line Drive Trustor stock that he discovered were certificates for 25, 5 and 100 shares of stock respectively. The certificate for 25 shares is dated November 7, 1916; that for 5 shares October 15, 1917, and that for 100 shares October 30, 1917.

Miss Gramen, recalled as a witness by the court, testified that the certificate for the 50 shares of stock in question was made out by her, and that it was common stock; that there was a regular stock book; that there was a stub in the book, and that she filled out the stub. She did not know where the book was at the time of the trial, but attorney for defendant stated that it was in Milwaukee.

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The following information is being furnished to you for your information and is not to be used for any other purpose.

It appears that the Line Drive Tractor Company went into the hands of a receiver. The cause was continued to get this important evidence, but the stock book was never found. The stock ledger was produced, however, by the attorney for the defendants, who stated to the court:

"The stock ledger does not disclose an entry of the transfer of the stock in question, no entries having been made after July 17, 1917. The highest certificate number we find in the ledger is less than 300. We find here, among the loose certificates sent on, certificates 304, 306, 310 and 330 not entered. So it clearly appears that the entries in this record, this stock ledger, were only carried up to July 17, 1917; we stopped at that time, and no entries of any subsequent stock transfers were made; so I say the stock ledger throws very little light on the question for which we desired."

The court, over the objection of the defendants, received in evidence the following letter:

W. A. Scott
July
Fifteenth
1918

Mr. A. M. Scott,
C/o American Trust & Security Co.
Chicago, Ills.

My Dear Mr. Scott,

I am leaving this evening for Aberdeen, S. D. where I will probably be for the next week or ten days.

Regarding the settlement I shall say nothing further as to what the understanding was which has been changed twice. We will overlook this, however, and assume the legal status, irrespective of all conditions and circumstances.

I have this suggestion to make, Mr. Scott, which I trust will meet with your approval. I would turn over to you at once \$1,000 of the stock of the National Live Stock Co., and the \$100 or whatever the interest amounts to, which I could take care of within the next week. I am trying hard to get on my feet, I am working day and night.

I will be glad to have you come up to the farm when I return from Dakota, and have you spend the week end with us, and will be pleased to tell you at that time what I am doing and how I am getting along."

Defendants argue that this letter should not have been received in evidence, because it is not made to appear that it refers to the particular transaction involved in the suit. No authorities are cited in support of this proposition. We think the letter was admissible and that, carefully read, it

contained statements which tend very strongly to disprove the theory of the case upon which defendants reply. This is not a letter which would have been written by defendant to a man who had not kept his express agreement to turn over notes which had been paid in full. On the contrary, it shows an indebtedness from Debever to Scott, and interest for thereon, which would be just about the amount accrued on these notes.

The trial court had the advantage of seeing the witnesses and hearing their testimony. Their evidence is in some respects contradictory. The possession of the notes is very strong evidence that the same had not been paid, and in view of that fact and this letter, we are not able to say that the finding of the court is against the manifest weight of the evidence. The judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

27842

HERMAN M. COMERFORD, Appellee,

vs.

INTERNATIONAL UNION OF STEAM
AND OPERATING ENGINEERS et al.,
Appellants.

226 I.A. 640

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE GRADLEY DELIVERED THE OPINION OF THE COURT.

It is sought by this appeal to reverse an order of the Circuit Court of Cook County, entered March 13, 1922, overruling a motion to dissolve a preliminary injunction, which was on January 16, 1922, granted against said defendants, International Union of Steam and Operating Engineers, a voluntary association, and Arthur M. Muddell and others, individually and as officers and members of said Union.

The injunction was issued without notice and without bond upon the filing of complainant's bill in accordance with the prayer thereof. Herman M. Comerford was the General Secretary-Treasurer of said Union, having been elected to that office for a term of two years, expiring December 31, 1922, and the defendants and each of them were restrained from declaring the office of General Secretary-Treasurer vacant and from taking possession of the same, from interfering with or preventing the complainant from discharging the duties of his said office, from keeping him from access to his office or the records of the Union, and from doing any act that in anywise would interfere with him in the discharge of his duties and obligations as such officer, until the further order of the court.

On January 31, 1922, the defendants filed their motion to dissolve the injunction on the ground of the insufficiency of

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11. The following information is taken from the financial statements of the company for the year ended 31st December 1991:

and a number of other persons, including the following, who are known to be in the possession of the same information:

THE INFORMATION WAS OBTAINED FROM THE FOLLOWING SOURCES:

James Earl Ray, Defendant, is now in the custody of the Federal Bureau of Investigation, and is being held in the Federal House of Detention, San Francisco, California.

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From 1990 to 1992, the number of people who had been in the United States for 10 years or more increased from 1.1 million to 1.4 million.

DATE OFFICE: 1-20-2010
 TIME: 10:00 AM

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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complainant's bill. No affidavits were presented. On February 6th arguments on the motion were had before the Chancellor and at his suggestion written briefs were thereafter submitted by the respective solicitors. He held the matter under advisement until March 1st, at which time an order was entered sustaining defendant's motion and dismissing complainant's bill for want of equity. Complainant immediately prayed an appeal and the same was allowed, conditioned upon filing bond within 30 days. On March 13th, before said appeal had been perfected and during the same term of the Court, the solicitors of the respective parties were before the same Chancellor arguing the question of the propriety of granting an injunction against defendants pursuant to the prayer of another and separate bill, filed by complainant's solicitor but on behalf of four or five members of the defendant union, whereupon the Chancellor, of his own motion, stated that he would vacate the said order in the present case of March 1st, wherein the injunction was dissolved and complainant's bill dismissed, and reinstate the case. And the court thereupon entered such an order, and further ordered that the preliminary injunction granted against these defendants be "revived" and be in full force and effect, and that defendants' said motion to dissolve the same be overruled. It appears that at this time the court was advised by said solicitors that, shortly after the order of March 1st had been entered dissolving the injunction and dismissing complainant's bill, complainant on charges preferred had been removed by the General Executive Board of the defendant Union and, subsequently and before March 13th, his successor had been appointed. Upon the entry of said order of March 13th defendants prayed and perfected the present appeal.

The case presents the somewhat unusual procedure of a court of equity dissolving an injunction, thereby allowing the defendants to accomplish the matters and things forbidden by the injunction, and then, after the lapse of several days, during

which time those matters and things were accomplished, and after the court had been advised to that effect, reinstating the injunction and overruling the motion to dissolve, without any supplemental bill having been filed setting out the changed status of the complainant.

Counsel for complainant here seeks to maintain the action of the court on the theory that complainant's removal was unlawful and a continuing injury to him. Counsel argues that complainant, having been elected to the office of General Secretary-Treasurer of the defendant Union for a two years period, ending December 31, 1922, and at a fixed salary of \$6000 per year, has a property right to the office, and that his unlawful removal is a continuing deprivation of that right which a court of equity should prevent.

Counsel for defendants contend that, the remedy by injunction being a preventive one, the writ cannot be made to operate so as to restore complainant to his office when, at the time of his removal, there was no injunction in force restraining such removal. We think that there is merit in the contention. In Fisher v. Board of Trade, 80 Ill. 85, Fisher, after having been expelled as a member of the Board of Trade of Chicago, asked for an injunction "restraining the Board, its secretary and board of directors, from interfering with him in any manner in the full enjoyment of his rights, privileges and franchises, and in his right in common with other members of the Board of entering the rooms used by the Board, and from remaining in attendance as a member on the sessions of the Board, and to transact business therein unmolested." The court said (p. 87): "This court, in Mangelin v. Gee, 90 Ill. 459, said an injunction was a preventive remedy merely, and can not be so framed as to command a party to undo what he has done. The very terms of the

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writ indicate its purpose - restraint. Stripped of its redundancies, the prayer of the bill is, in effect, to restore appellant to his position as a member of the board of trade, nothing less. It must be apparent a court of chancery can not do this. The action of the board is final and complete, and if it has erred in that action, either on the merits or has acted in a case without having jurisdiction, chancery cannot afford a remedy." In Champion v. Hannahan, 138 Ill. App. 387, the prayer of the bill was to the effect that the defendants be restrained from publishing, in the official organ of the Brotherhood of Locomotive Firemen, (also a voluntary association) the names of the complainants, or of the lodges to which they belonged, ^{and} the fact that complainants had been expelled or suspended from said Brotherhood and were no longer members thereof, and from expunging from the membership list the names of complainants, and from depriving them of the benefits and privileges of membership in said Brotherhood, etc. The court said (p. 405): "It seems clear, then, that in the last analysis the real object of the bill is to restore appellants to membership. In this view of the bill the court did not have jurisdiction. A court of equity will not do this, even if they were unlawfully expelled. An injunction is a preventive remedy merely, and cannot be so framed as to command a party to undo what he has done." (See, also, Baxter v. Board of Trade, 33 Ill. 146, 147; Bostedo v. Board of Trade, 287 Ill. 90, 91; Engel v. Gulish, 258 Ill. 98, 102.)

Even if, at the time the Circuit Court entered the order appealed from, complainant had not actually been removed from his office as General Secretary-Treasurer, we do not think that the injunction should have been granted. The allegations of the bill disclosed that complainant's remedy was at law, under repeated decisions of the courts of review of this State.

(Sturges v. Board of Trade, 86 Ill. 341, 442; Malachuk v. Garner, 75 Ill. 185, 186; Allen v. Chicago Undertakers Association, 232 Ill. 458, 463; Engel v. Walsh, 258 Ill. 98, 103.) He had no such property right in his office, or to the salary incident thereto, as warranted the intervention of a court of equity. (22 Culling Case Law, p. 525, sec. 217; Donahue v. County of Ill., 100 Ill. 94, 104; People v. Barrett, 203 Ill. 99, 109; Gisan v. Scully, 296 Ill. 412, 420.)

Our conclusion is that the order of the Circuit Court overruling defendants' motion to dissolve the injunction should be reversed and the cause remanded to the Circuit Court with directions to dissolve the injunction, and it is so ordered.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes and Merrill, JJ., concur.

MARGARET M. MCCARTHY,
Appellee,

vs.

WILLIAM J. MCCARTHY,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BARNER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree for separate maintenance. A prior decree adverse to complainant (appellee on this appeal) was reversed by this court and the cause remanded with directions to hear evidence as to a proper amount to be allowed complainant for her separate maintenance, and for solicitors' fees and costs, and for other proceedings not inconsistent with our opinion. (219 Ill. App. 369.) The merits of the case having been disposed of in that opinion, only questions left for further adjudication on the remandment are now open for our consideration.

Both parties have assigned errors, appellant to the allowance of alimony and solicitors' fees as excessive, and appellee to the allowances for permanent alimony and for the two minor children of the parties, as inadequate and insufficient.

The decree now appealed from allows \$330 per month for alimony in arrears from the date of filing the petition for temporary alimony to February 20, 1920, the date of the death of appellant's father, and \$600 per month from the latter date to the date of the entry of the decree, aggregating \$17,600 for alimony in arrears, \$450 per month for alimony from June 30, 1921, the date of the decree, and \$160 per month from that time

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 DEPT. OF THE INTERIOR
 BUREAU OF LAND MANAGEMENT
 WASHINGTON, D. C.

TO: THE SECRETARY OF THE INTERIOR
 FROM: THE DIRECTOR OF THE BUREAU OF LAND MANAGEMENT
 SUBJECT: [Illegible]
 RE: [Illegible]
 [The following text is extremely faint and largely illegible due to the quality of the scan. It appears to be a memorandum or letter detailing land management issues, possibly related to the '1935' date and 'Bureau of Land Management' header.]

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for the support, care and education of the two minor children of said parties, \$7,500 for solicitors' fees, and \$2,565.35 for miscellaneous expenses, making a total, after crediting \$4,870, of \$22,795.35.

We deem a detailed analysis of the evidence bearing on the ability of defendant to pay the amount of alimony so awarded as unnecessary. It is sufficient to say that it discloses that at the time of the separation of the parties in 1917, and for some time prior thereto, and up to the death of his father, appellant's income was about \$10,000, and that upon his father's death he inherited an estate amounting to \$283,410.50, made up of cash and valuable securities, from which his net income was over \$14,400 per year.

The evidence also discloses that prior to his father's death he lived in a style which required several thousand dollars a year more than his income. But however he met such expenses, whether through the generosity of his father or not, is immaterial, for the allowance made for alimony in arrears of \$320 per month prior to his father's death is based upon his then income of \$10,000 a year, and, therefore, cannot under all the circumstances be deemed excessive. Nor in view of his large inheritance and income therefrom can we deem excessive an allowance of \$600 per month after the father's death for permanent alimony and support, care and education of the two children, who have reached an age when, it is conceded, expenses for a more liberal education will be properly incurred. Based, as these allowances may well have been, upon a conceded income, to which under all the circumstances they are not unreasonably disproportionate, there is no occasion to review evidence relating to other disputed sources of income.

Nor can we agree with appellee's contention that these allowances are inadequate. Should the allowances made

and the present, were not separated at the first meeting
of said meeting. It was the intention, however, that the
the representatives, present, would, if possible, be
in, at the first meeting.

On the 1st of January, 1900, the following meeting
of the committee was held at the house of Mr. J. H. H.
The committee was organized, and it was decided to hold
the first meeting at the house of Mr. J. H. H. on the 1st of
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for the future prove not reasonable or proper the court below has ample power to alter them. (Section 18, Divorce Act.)

Appellant urges that the court improperly allowed an item for suit money and \$7500 for solicitors' fees. An item of \$1500 for miscellaneous expenses includes about \$700 for expenditure in a trip to Atlantic City, N. J., for the purpose of taking depositions after the cause was remanded. It was stipulated that the evidence should be material to the cause, otherwise the depositions were to be without expense to appellant. The record discloses that the evidence taken related almost entirely to the cause of action, the merits of which had already been adjudicated. It also related to matters arising after the filing of the original bill although there was no supplemental bill. The evidence had no material bearing on appellant's financial resources, with respect to which it was stipulated the depositions were to be taken. Appellee seeks to justify such expense on the ground that a bank at Atlantic City, where the depositions were taken, had cashed a check of several thousand dollars for appellant. The check was drawn on a Chicago institution. The fact it was cashed in Atlantic City on appellant's endorsement afforded no reasonable ground for taking such depositions as to his financial resources and charging the expense of the fruitless undertaking to him. Hence an allowance for expenses and solicitors' fees in taking them, was improper. It may be inferred from testimony on the subject that an allowance of \$750 at the rate of \$75 per day for ten days' time, taken by complainant's solicitors in the matter, is included in the item of \$7,500, and the \$700 in the item of miscellaneous expenses.

It is urged on the ground of a failure to give appellant's counsel proper notice of their taking, the depositions should have been suppressed on appellant's motion. Whether they

should have been suppressed or not, as they contained no evidence material to the questions for determination on the remandment of the cause, they should not have been received in evidence. Their only effect, however, was the improper inclusion of such expenses and solicitors' fees as a charge against appellant, which can be eliminated from the decree.

It appears that there were several attorneys employed by complainant in the course of the conduct of the suit, and it is urged that their services were to some extent duplicated, and that the court made a too liberal allowance therefor. Counsel fails to point out either in the abstract or record the evidence relating to this subject. We cannot be expected to search through the record and find it. We do, however, find in the abstract that appellant's counsel testified that a reasonable charge for the legal services of the solicitor who went to Atlantic City was from \$50 to \$75 a day, and it appears he was gone from Chicago in that matter about ten days. In the absence of other reference to testimony on solicitors' fees we must assume that there was sufficient evidence to justify the allowance of \$7,500 therefor, subject, however, to a deduction of \$750 for services rendered in taking depositions in Atlantic City. Subject, therefore, is modified by deducting \$750 for solicitors' services, and \$700 for unwarranted expenses from the total of \$22,795.35, decreed as the sum due to appellee at the date of the decree, the decree will be affirmed. As so modified the decree will be affirmed for \$21,345.35.

AFFIRMED AS MODIFIED.

Gridley, E. J., and Morrill, J., concur.

PEOPLES TRUST & SAVINGS BANK,
a corporation,

Appellee.

vs.

GEORGE E. HOOVER et al.

GEORGE E. HOOVER,

Appellant.

226 I.A. 641

APPEAL FROM

SUPERIOR COURT.

COCK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order appointing a receiver upon a creditor's bill, and the answer thereto. After first setting out in general language the existence of such states of facts as under section 49 of the Chancery act warrants a bill to compel discovery of any property or thing in action belonging to the judgment debtor the bill sets forth that the defendant is the owner of certain stocks and bonds, and that pursuant to an agreement with his co-defendant, Lawson P. Wright, they were deposited in a certain bank to be disposed of, or their avails to be disposed of, according to an escrow agreement. These specific averments were not denied, defendant Hoover, the judgment debtor, confining himself in his answer to denials of the general allegations.

In support of his contention that the appointment of a receiver was unwarranted appellant cites the case of First National Bank of Sioux City et al. v. Gage et al., 79 Ill. 307, where a bill to discover assets was held good as a bill of discovery but did not warrant the appointment of a receiver. The court there said there was no necessity shown by the bill for the appointment of a receiver because there was no distinct charge of fraud nor that defendants had any particular property or things in action in their possession. In the case at bar, however, there are such

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specific allegations, and presumably because of the way and the failure of defendant Haven to deny that the chancellor granted the order, and therefore we do not think he abused the discretion which the act concerning the appointment of receivers, approved May 16, 1903, in force July 1, 1903, (Ch. 22, pars. 55, 56, Cahill's stats.) vests in him.

It is urged that as defendant offered to give a bond, which under said act the court may accept in lieu of the appointment of a receiver, the court abused its discretion in entering the order. This point might have been urged with more force if the answer had been as full as contemplated by sec. 53 of the Chancery Act. But as it seemed to evade a disclosure respecting the specific allegations referred to we cannot say that the court abused its discretion in the matter.

Accordingly the order will be affirmed.

AFFIRMED.

Gridley, F. J., and Morrill, J., concur.

416 - 27374

CHICAGO STEEL TANK COMPANY,
a corporation,

appellee,

vs.

F. R. ^SFRISWELDT,

Appellant.

226 I.A. 641

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The statement of claim in this case charges that the defendant negligently drove his automobile so as to collide with the automobile of plaintiff, damaging the same in the sum of \$135.50. On a hearing without a jury the court found the issues for plaintiff and assessed his damages at the sum claimed as such.

Appellant calls attention to the fact that there was no proof to show that he either owned or operated the automobile which is alleged to have collided with appellee's. Appellee contends that because the ownership and operation of the car was not denied they must be deemed admitted. Appellee also contends that as this was a fourth class case no pleading was required of defendant. The two positions are inconsistent. The record shows no pleading by defendant, and if we may assume that none was required, yet in the absence from the record of any rules of the court to the contrary, the burden of proving what was alleged in its statement of claim could not be dispensed with. Hence, there being no proof that appellant owned or operated the car which is alleged to have done the damage, or of rules of court dispensing with such proof, the judgment cannot stand.

But assuming appellant owned the car in question the circumstances of the accident disclose that appellee was quite as much at fault for the collision as appellant. The accident

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took place at the intersection of Sheridan drive, which runs north and south, and Oak street, which runs east and west, in the Village of Winnetka. It was dark and raining. There were no street lights at the intersection. The car alleged to be defendant's was a truck being driven south on the former street, and plaintiff's automobile, a touring car, northward on the same street until it reached Oak street, when it turned west on the latter street. The testimony for plaintiff was that its touring car was being driven northward on Sheridan drive with the intention of turning west on Oak street at the rate of fifteen to twenty miles an hour; that the car was slowed down to about eight or ten miles an hour; that the driver gave a signal to make the turn, and not until he made it did he see the truck, then only a few feet north of him; that the truck was not lighted and gave no signal.

Such testimony hardly tended to show negligence in driving the southbound car unless the absence of such light or of such signal constituted negligence. The testimony for plaintiff supplemented by that for defendant clearly indicates, we think, that the driver of plaintiff's car was guilty of contributory negligence. The driver of the truck testified that he was driving at about fifteen miles an hour; that when he approached the point of collision he saw the other car about 15 feet south of the south side of Oak street, traveling about the same speed as his truck; that when plaintiff's car reached about half-way across Oak street the driver swung it sharply to the west; that no signal was given before the turn; that he immediately set his brakes, which caused his car to skid on the wet pavement and his rear left wheel or fender to collide with the front wheel of the touring car; that he had a lighted lantern on the east side of his truck. It thus appears that both were

driving at about the same rate of speed, and that neither saw nor heard any signal from the other. According to testimony for plaintiff its car "in going around the corner" was running eight to ten miles an hour, a rate of speed which, under section 28 of the Motor Vehicle Law of 1919, constitutes prima facie evidence of operating at a rate of speed greater than is reasonable under the circumstances of the time and place. The driver of the truck had good reason to believe until the touring car turned westward that driving at such a rate of speed it would continue northward and not turn across his path, and taking the entire evidence together we think the plaintiff was guilty of contributory negligence.

Accordingly the judgment will be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

Gridley, P. J., and Morrill, J., concur.

416 - 27374

FINDING OF FACT.

We find that appellee, Chicago Steel Tank Company, a corporation, was guilty of negligence contributing to the injury in question.

1. The first question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged. The evidence must be such that a reasonable person, acting on the basis of the evidence, would believe that the defendant is guilty of the crime charged.

425 - 27385

H. E. TOLMAN, Appellee.

vs.

SIMON DANSEK, Appellant.

220 L.A. 641

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a forcible detainer case and was consolidated for hearing with No. 27389, H. E. Tolman v. Albert Jordan. The two cases involve the same legal questions arising upon identical leases, and like steps had been taken by the landlord thereunder. Hence what we have said in the opinion filed in the latter case on this date is applicable to the case at bar and decisive of its merits.

Accordingly for the reasons therein stated the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Merrill, J., concur.

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427 - 27385

E. E. TOLMAN,
Appellee,

vs.

FRANK J. SCHULZ,
Appellant.

220 A.A. 641

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a forcible detainer case and was consolidated for hearing with No. 27389, E. E. Tolman v. Albert Bergen. The two cases involve the same legal questions arising upon identical leases, and like steps had been taken by the landlord thereunder. Hence what we have said in the opinion filed in the latter case on this date is applicable to the case at bar and decisive of its merits.

Accordingly for the reasons therein stated the judgment is affirmed.

AFFIRMED.

Gridley, F. J., and Merrill, J., concur.

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428 - 27396

226 I.A. 641

E. E. TOLMAN,
Appellee.

vs.

HENRY H. MINNAN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a forcible detainer case and was consolidated for hearing with case No. 27398, E. E. Tolman v. Albert Borden. The two cases involve the same legal questions arising upon identical leases, and like steps had been taken by the landlord thereunder. Hence what we have said in the opinion filed in the latter case on this date is applicable to the case at bar and decisive of its merits.

Accordingly for the reasons therein stated the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

146 A.I.S.S.

[illegible]

MAX WEHRMANN et al.,
copartners doing business
as MAX WEHRMANN AND SONS,
Appellees,

vs.

S. E. LAVICK & COMPANY, Inc.,
Appellant.

22011.042

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered on the verdict of a jury for \$1412.62 in favor of the plaintiffs in an action of assumpsit, for labor and material furnished in making certain office furniture, including certain cabinets, which defendant claimed were not made in a workmanlike manner, whereby it was compelled to have the same completed at an expense of \$1356. While various errors are assigned we need consider only one, namely, error in giving plaintiffs' instruction No. 2, which reads as follows:

"The court instructs you that even though you may believe from the evidence that the plaintiff did not complete all the work that the defendant desired said plaintiff to complete, yet said plaintiff is entitled to recover for the reasonable value of the services and the material so furnished by the plaintiff and used by the defendant."

This is a mandatory instruction to the effect that upon the one condition stated plaintiffs were entitled to recover for such services and material, regardless of proof presented to the jury upon issues going to the defendant's right of recoupment. It therefore ignored the defense and erroneously directed a verdict without any reference to such issues. (Fardridge v. Cutler, 168 Ill. 504; Mooney v. City of Chicago, 239 Ill. 414, 422.) It is elementary that an instruction directing a verdict cannot be supplemented or cured by any other. (Cantrell v. Harding,

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249 Ill. 354, 357; Wrieger v. A. B. & C. Co., Inc., 42 Ill. 544, 551.)

A discussion of the other errors assigned will be of no special value upon a new trial thus rendered necessary.

REVERSED AND REMANDED.

Gridley, P. J., and Merrill, J., concur.

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437 - 27415

BENJAMIN F. ANGUS,

Appellee,

vs.

LOUIS H. MARKS,

Appellant.

2261A. 642

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendant in a forcible detainer suit. The points made by appellant are that the notice to terminate the lease was insufficient, and that there was inadequate proof of its service on him.

Appellant held the premises, a flat in Chicago, under a lease to him from one Mitchell, for whom the real estate firm of Rowe & Whitman acted as agents in collecting the rent and re-leasing the premises to plaintiff Angus for a period of one year from May 1, 1921. The lease to appellant, which ran to April 30, 1921, contained the following provision for its termination:

"Provided sixty days' written notice is given lessor by lessee of lessee's intention to terminate this lease on said last mentioned date, otherwise this lease shall continue from year to year until terminated by like notice in some ensuing year. Lessor is entitled to terminate this lease upon like notice to lessee at like dates."

The lease also provided that its covenants would be binding and inure to the respective assigns of the parties thereto, and that such covenants might be exercised by him or their attorney or agent.

On February 23, 1921, a registered letter was mailed to defendant addressed to the premises in question, where he resided, notifying him that his tenantry of the same would expire at midnight, April 30, 1921. It was signed "Rowe & Whitman, Agts."

220 A. 1039

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There was proof that the letter was duly mailed and that a receipt of its delivery, signed "Harry L. Marks" (a name by which defendant was known) was received at the office of said Rose & Whitman on the 27th or 28th of February, 1921. Marks testified that he was out of Chicago from February 24th until some time in March, 1921; that he did not receive the letter in question during the month of February but that it was handed to him by his wife some time in March, about the 8th or 9th, when he returned. There was some evidence tending to show that he was in the city on February 28th, but we need not discuss the same in view of the explicit and unimpeached evidence that appellant did not in fact receive the notice until some time in March and, therefore, did not receive sixty days' notice of the termination of the lease, as required by such provision. While the mailing of the notice was prima facie evidence that it was received by the party addressed yet the presumption therefrom may be rebutted. (Young v. Clapp, 147 Ill. 176, 190; Seyer v. Krohn, 114 Ill. 574, 586; May v. American Bottle Co., 187 Ill. App. 626.) And while, as stated in the last two cases, the mailing of such notice under such circumstances presented a question of fact for the jury to determine, yet when there is positive and credible evidence that the notice was not received by the defendant personally, and merely evidence that he might have received it in rebuttal, and that the receipt of the registered letter was signed by some one else in his absence, we think the presumption that he received personal service before the registered letter was actually handed to him was overcome.

Nor do we think the notice was sufficient. There was nothing in it to indicate for whom Rose & Whitman were acting as agents. The facts testified to that they were agents of the building in question and had complete charge of the same, made leases, collected rents, paid taxes, and looked after repairs for Mitchell,

There was proof that the letter was duly mailed and that a receipt of the delivery, signed "Henry L. Barker" (a name by which defendant was known) was received at the office of said firm a short time after the date of mailing, 1932. Much was said that the letter was not delivered to the person in question and that the receipt of the letter was not received by the person in question, but that it was handed to him by his wife some time in 1932, about the 1st of May, when he returned. There was some evidence tending to show that he was in the city on February 28th, but no direct evidence to show the view of the available and undisputed evidence that defendant did not in fact receive the letter until some time in March and, therefore, did not receive any notice of the mailing of the letter, as required by such provision. While the mailing of the letter was being taken evidence that it was received by the jury defendant and the prosecution were not in contact with the jury defendant, but the jury were informed that the mailing of the letter was in the last two weeks, the mailing of which notice under such circumstances constituted a violation of the law for the jury to determine, yet when there is evidence and evidence evidence that the notice was not received by the defendant personally and that the evidence was not received by the defendant, and that the receipt of the registered letter was signed by some one else in his absence, so that the presumption that he received the letter before the registered letter was actually handed to him was not to be drawn.

But do we think the notice was delivered? There was evidence in it to indicate that when the letter was mailed in 1932, the letter was mailed in the last two weeks of the year, in March and had complete change of the name, which was, without notice, and looked after against the defendant.

appellant's lessor, did not establish their authority or power as agents to terminate any lease their principal, or they in his behalf, had executed. Nor did the fact that they executed a lease from Mitchell to Angus, in the absence of any evidence of the extent or limitation of their authority, authorize them to terminate the previous lease to appellant Marks. No written authority of any kind was offered in evidence and hence no legal proof of the right of such agents even to lease the premises to the plaintiff Angus. Unless Mitchell gave Howe & Whitman authority in writing to make such a lease Mitchell might repudiate it. (Kelly v. Fischer, 263 Ill. 184.) And without he gave such authority to said agents to terminate his lease to Marks, had the latter acted upon the assumption of their authority and vacated the premises he would have done so at his peril.

On account of the insufficiency of the notice and of the proof of its service in time, as required under the lease, the judgment will be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley, F. J., and Morrill, J., concur.

457 - 27415

FINDING OF FACT.

We find that appellant, H. L. Marks, did not receive sixty days' notice of the termination of the lease in question.

1994-1995

153 - 27106

ECONOMIC SPECIALTY COMPANY,

a corporation,

Appellee,

vs.

THE EDWARD VALVE AND MANUFACTURING
COMPANY, a corporation,

Appellant.

226 I.A. 642

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff, who is appellee here, recovered judgment upon a verdict in the Municipal Court of Chicago for \$14,450, which is the amount alleged to be due from defendant as royalties upon the manufacture and sale of certain articles covered by letters patent owned by plaintiff. There was also a special finding by the jury to the effect that there was an agreement between the parties whereby defendant was given the exclusive right to manufacture and sell under plaintiff's letters patent, for a period commencing October 1, 1917, and ending with the expiration of said letters patent, for the sum of \$350 per month during said period. A reversal is sought upon the ground that the judgment is contrary to the law and the evidence; that the special finding is against the evidence and that the trial judge erred in his rulings upon questions of evidence and in giving and refusing instructions.

Plaintiff's amended statement of claim alleged in substance that on October 1, 1917, it was the owner of nine letters patent of the United States covering certain articles which had been manufactured and sold by defendant under a license agreement that terminated September 30, 1917; that on October 1, 1917, defendant acquired from plaintiff the exclusive right to manufacture and sell said articles for the unexpired

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Received 10 June 1993; accepted 10 June 1993

period of said patents, in consideration of the payment by defendant to plaintiff of the sum of \$850 per month; that thereafter a written memorandum dated October 1, 1917, embodying the terms of said agreement was prepared and submitted to plaintiff and accepted by it but that defendant failed and refused to sign the same; that defendant on and after October 1, 1917, continued to manufacture and sell said articles pursuant to the authority and privilege granted by said agreement; that defendant paid to plaintiff the sum of \$850 for the privileges granted for the months of October, November and December, 1917, and January and February, 1918, but that since February, 1918, it has refused to pay any sum whatever for said privileges; that \$850 per month is a reasonable value of the privileges granted by said contract and ^{that} there is due from defendant to plaintiff for said privileges exercised by it from March 1, 1918, to the date of the commencement of the action the sum of \$14,450. Defendant's affidavit of merits denied all of the allegations of the statement of claim, except that plaintiff was the owner of the nine patents; that defendant had manufactured by virtue of license agreements under those patents ending September 30, 1917, and that defendant had paid \$850 per month for the five months ending February, 1918. The affidavit of merits further stated that the alleged contract mentioned in the statement of claim was based upon certain promises alleged to have been made by one Olaf J. Gleason, president of defendant corporation, who at the same time was president and director of plaintiff corporation. It expressly denied the payment of any money in pursuance of the contract alleged by plaintiff to have been made October 1, 1917.

The evidence shows that on October 10, 1917, the board of directors of plaintiff corporation, consisting of three members, met in special meeting at the automobile Club in Chicago to discuss the question of a new contract between the parties, the rights of defendant to manufacture and sell the articles

covered by the patents having expired September 20, 1917; that said Oleson was president and director and the largest stockholder of plaintiff corporation and was also the president, director, general manager and a minority stockholder of defendant corporation at the time the meeting occurred; that no other representative of defendant corporation was present at the meeting.

It is undisputed that Oleson owned over thirty-six per cent of the stock of plaintiff company and less than seven per cent of the stock of defendant company. At this time plaintiff had five stockholders, three of whom were directors, and defendant had over forty stockholders. The minutes of this meeting show that action was taken by the directors of plaintiff company instructing its secretary to notify defendant that the lease on said patents had expired October 1, 1917, and that if defendant wished to continue the use of said patents it could have that privilege for a period of sixty days from October 1, 1917, at a rental of \$1700 for said period, payable in two instalments of \$850 each, and that if defendant wished to enter into a new lease for said patents the same would be granted by plaintiff for the entire unexpired time of said patents at a rental of \$850 per month. These terms were accepted by Oleson on behalf of defendant. The proposition for a temporary extension of the agreement for a sixty day period pending negotiations for a new license was accepted by defendant, which paid the required royalty for the months of October and November, 1917, by voucher checks, the last of which specified that the payment was made under the sixty day agreement and pending negotiations for a contract. On December 4, 1917, counsel for plaintiff sent to counsel for defendant a draft of the contract between the parties covering the proposed use of the patents from October 1, 1917, to June 8, 1926, the date of the expiration of the patents. This agreement gave to defendant the exclusive right to manufacture and sell the articles covered by

the patents for said period in consideration of the payment of \$950 per month, and among other things recited its execution pursuant to authority given by the board of directors of the two companies. This proposed agreement was never executed by the parties, but on the contrary, two of the three directors of defendant corporation testified explicitly that in conversations with directors and officers of plaintiff corporation, they had stated that the terms proposed were unsatisfactory and would not be accepted. Defendant continued to use the patents for the months of December, 1917, and January and February, 1918, paying therefor the sum of \$950 per month. These payments were received by plaintiff in full satisfaction of its claims for those months. There is evidence showing that the negotiations continued between the parties up to February 8, 1918, on which date the secretary of defendant wrote to plaintiff's secretary advising the latter, in substance, of the receipt of the proposition for a new license agreement from plaintiff to defendant upon the terms covered by the proposed contract and that after consideration the board of directors of defendant declined to accept the proposition; that defendant offered to pay for the use of the patents during the unexpired term thereof \$500 per month, provided defendant be given an option to purchase said patents for the sum of \$35,000 and notifying plaintiff that unless this offer was accepted on or before February 15, 1918, defendant would discontinue the use of the patents in question and pay no further royalties after that date. That the parties were negotiating for a new license agreement during the months of December, 1917, and January, 1918, is further shown by a letter dated December 29, 1917, from Gleason to the secretary of plaintiff company, in which he referred to the fact that he had promised an officer of plaintiff company that he would try to get the defendant company to reach a conclusion by the first of the following year and that defendant

company, of which he was president and general manager, could unquestionably pay the royalty as it had theretofore done and is further shown by the oral testimony of directors of both companies. There is no evidence of the existence of any contract between the parties covering the use of the patents after October 1, 1917, except the sixty day agreement hereinbefore mentioned. During the period between the culmination of this agreement and March 1, 1918, defendant, with the acquiescence of plaintiff, paid the royalty in question pending the negotiations for a new license agreement, which were definitely terminated by defendant's letter of February 8, 1918.

Plaintiff's claim that an agreement existed between the parties covering this matter appears to be based upon the proceedings taken at the meeting of the directors of plaintiff corporation held at the Automobile Club October 10, 1917. Defendant insists that no contract was agreed upon at that time and that Oleson was incompetent to represent defendant at that meeting on account of his pecuniary interest in plaintiff company; that this interest was recognized by Oleson, whose conversation indicated that he acceded to the proposed royalty of \$650 a month largely because he would receive his share of that sum as a stockholder in plaintiff company. This is shown by the testimony of the other directors of plaintiff company. Oleson's relations to both companies were of such a fiduciary character that transactions between them must be jealously scrutinized. Oleson was a common director in both companies and had a dominating influence in their corporate actions. Geddes v. Anaconda Copper Mining Co., 154 U. S. 590; Charter Gas Engine Co. v. Charter, 47 Ill. App. 36; Farwell v. Pyle-National Co., 212 Id. 400; Gilman v. Kelly, 77 Ill. 426. His oral acceptance of the terms of the proposed agreement was not binding upon defendant (7 R. C. L. p. 462), which expressly

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repudiated his action.

It is undisputed that the written contract embodying the plan proposed at this meeting was never executed by the parties. The evidence shows that the plan was definitely rejected by the board of directors of defendant and there is no pretense that it was ever submitted to the stockholders of defendant company. Counsel for plaintiff contend that this plan was ratified by defendant through its subsequent payments of royalty for the months of December, 1917, and January and February, 1918, but this conclusion is entirely unwarranted by the evidence, which shows clearly that during the period in question the negotiations between the parties were still continuing, and that defendant never accepted the proposed agreement.

It is also contended by plaintiff that during the entire period between March 1, 1918, and July 25, 1919, defendant continued to manufacture and sell the articles covered by the letters patent in question and that these sales amounted to the sum of \$255.66 during this period of sixteen months. The record contains evidence tending to show that during this period defendant sold a few articles of a character similar to those covered by the letters patent. These letters patent related to pipe fittings, valves, unions and other appliances of a similar character. It may be true that defendant sold articles of this character, but it is a matter of common knowledge that appliances of this kind might be manufactured and sold which were not covered by plaintiff's patents. The small amount of the sales claimed to have been shown by the evidence would indicate that defendant ceased to manufacture and sell under the patents on March 1, 1918, as it asserts, and that if any such articles were sold, they had been manufactured prior to March 1, 1918. We find no competent evidence in the

record showing that defendant was guilty of any infringement of the patents after that date. The record shows that there was no agreement, express or implied, between the parties covering the use of the patents by defendant subsequent to October 1, 1917, except the temporary agreement heretofore mentioned permitting the manufacture and sale of these articles pending the negotiations for a new license agreement.

The judgment of the Municipal Court is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Gridley, R. J., and Barnes, J., concur.

records showing that defendant was guilty of any wrongdoing
of the nature of the facts, the Court would not have
any agreement, express or implied, between the parties
covering the use of the records by defendant without the
approval of the Court, and the temporary agreement mentioned
contained providing the same should not be used at that
time. The Court is of the opinion that it is proper to
allow the use of the records at that time.

Very truly yours,
J. Edgar Hoover

FINDING OF FACTS.

The court finds as ultimate facts in the case that there was no agreement between the parties to this suit giving defendant the exclusive right to manufacture and sell under letters patent belonging to plaintiff for the period commencing October 1, 1917, and ending with the expiration of said letters patent, and that defendant did not manufacture and sell the articles covered by said patents after March 1, 1923.

1. The first thing I noticed when I stepped out of the plane was the cold. It was a sharp contrast to the warm, humid air of the tropics. I had heard that the weather in the north was harsh, but I didn't realize just how cold it would be. The wind was biting, and the sun felt like a distant, weak light. I wrapped my coat around myself, trying to keep warm. The ground beneath my feet was a mix of dirt and snow, and the air smelled like frost. I took a deep breath, trying to get used to the new environment. The first few days were a challenge, but I knew I had to adapt. I had come here for a reason, and I was determined to make the most of my time. I started by finding a place to stay, a simple cabin with a fireplace. The fire was a welcome sight, and the warmth it provided was exactly what I needed. I spent the next few days exploring the area, taking in the beauty of the landscape. The mountains were majestic, and the forests were dense with evergreen trees. I saw many animals, from small birds to large mammals. The people I met were friendly, but they were also very hardworking. They had a deep connection to the land, and they knew every inch of it. I learned a lot from them, and I was grateful for their hospitality. As the days went by, I began to feel like I was part of the community. I had found a new home, and I was ready to stay. The cold was no longer a problem, and the wind was just a part of the scenery. I had adapted, and I was thriving. I had found a new life, and I was ready to embrace it. The first few days had been a challenge, but they had also been a journey. I had learned a lot about myself and the world around me. I was ready to face whatever came my way, and I was determined to make the most of my time. The cold was no longer a problem, and the wind was just a part of the scenery. I had adapted, and I was thriving. I had found a new home, and I was ready to stay. The first few days had been a challenge, but they had also been a journey. I had learned a lot about myself and the world around me. I was ready to face whatever came my way, and I was determined to make the most of my time.

MARIE LEFKOVITZ,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
CHICAGO CITY RAILWAY COMPANY,
CALBERT & SOUTH CHICAGO RAILWAY
COMPANY and the SOUTHERN STREET
RAILWAY COMPANY, Corporations,
Doing Business as CHICAGO
SURFACE LINES,
Appellants.

2267 A 242

OFFICE OF THE CLERK OF THE COURT
OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Appellee, who was plaintiff in the Municipal court, recovered judgment against appellants for \$1,000 as damages for personal injuries alleged to have been sustained by her and resulting from an accident caused by appellants' negligence in the operation of one of their cars, in which appellee was a passenger. The statement of claim alleged that while plaintiff was alighting from the car at the intersection of Division Street and Oakley Boulevard in Chicago, where the car was standing still, it being a usual place for the discharge of passengers, and while she was in the exercise of due care and was in the act of stepping to the ground, the car was suddenly and negligently started forward, causing plaintiff to be thrown to the ground. The affidavit of merits denied that defendants were guilty of the negligence charged and alleged that the car was not started forward while plaintiff was alighting therefrom, and that the injuries of which plaintiff complained were due solely to her own want of care and negligence. A reversal is sought upon the ground that the verdict and judgment were contrary to the manifest weight of the evidence and that the court erred in giving certain instructions to the jury as to the degree of care which defendants were required to exercise.

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Plaintiff's testimony is the only evidence offered in her behalf as to the circumstances under which the accident occurred. She testified that as the car, which was going west on Division street, approached Oakley boulevard, she arose from her seat, walked to the door of the car and requested the conductor to stop the car at Oakley boulevard, although stating, in substance, that the car always stopped at that place without such a request; that she started to alight and while her left foot was on the step of the car and her right on the ground, the car gave a sudden jerk, which caused her to fall to the pavement. She had no further recollection as to the accident.

On behalf of defendants the conductor of the car testified that when the car was coming to its regular stop at Oakley boulevard the plaintiff suddenly stepped off the car, holding the handle with her right hand, and stepping backwards; that he told her to wait until the car stopped and endeavored to keep her from attempting to alight when the car was in motion; that at the time plaintiff stepped from the car it was coming to a stop and moved several feet after she fell. The conductor is corroborated by another witness, also in the employ of defendants as a conductor, who was off duty at that time and who happened to be riding on the rear platform.

It is apparent that the evidence as to the operation of the car and the circumstances under which the accident occurred was conflicting, thereby rendering it essential that the jury be instructed accurately as to the law. At plaintiff's request the following instruction was given to the jury:

"The court instructs you that it was the duty of the defendants' employes in charge of operating the car, to use the highest practical degree of care under all the existing circumstances for the safety of passengers and their protection against accidental injuries arising from the operation of the car. And if you believe from the evidence in this case that they neglected as to do and that the plaintiff while in the exercise of due and

ordinary care for her own safety in stepping off the car was thrown down and hurt and thereby suffered injuries by reason of such negligence, then the defendant is to be held responsible for all pecuniary damages, if any, directly caused to the plaintiff by such want of care, if any, on the part of the defendant's employees."

This instruction is without limitation as to the degree of care required by defendants and should have stated that the degree of care required of defendants is such as is consistent with the "practical operation of the road." Failure of an instruction to require that the degree of care and vigilance owing by a carrier to a passenger be "consistent with the practical operation of the road" is error. Tri-City Ry. Co. v. Gould, 217 Ill. 317; North Chicago Street R. Co. v. Folger, 203 Ill. 238; Todd v. Chicago Ry. Co., 210 Ill. App. 827. The instruction was also subject to criticism in that it did not limit the plaintiff's right of recovery to injuries resulting from the acts of negligence charged in the statement of claim, but authorized a recovery for any negligence of which the jury might have considered the defendants guilty. Bainar v. C. C. Ry. Co., 233 Ill. 129; Hackett v. C. C. Ry. Co., 236 Ill. 116; Lyons v. Ryerson, 242 Ill. 409. We cannot disregard prior decisions upon this subject, and must reverse the judgment and remand the case.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

226 I.A. 643

HENRY B. CLARK,
Appellee,
vs.
CHARLES WHITE,
Appellant.

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MONMILL DELIVERED THE OPINION OF THE COURT.

Upon a trial by jury in the Municipal court of Chicago appellee recovered a judgment against appellant for \$750 claimed to be due him as commissions in connection with the proposed sale of certain real estate in Chicago. Appellant concedes that the agent secured two persons as purchasers of the real estate and that these persons were ready, able and willing to purchase the property at the agreed price of \$25,000, but urges as reasons for a reversal that before a real estate broker is entitled to commissions he must not only secure a purchaser ready, willing and able to buy, but a valid contract of sale must be executed by the parties, and further, that the proposed contract of sale involved herein was void for want of mutuality.

The evidence shows that plaintiff is a duly licensed real estate broker in the city of Chicago; that with the consent of the owner he undertook to find a purchaser for the real estate owned by defendant at the price of \$25,000, which defendant agreed to accept. A contract embodying the terms of the sale, to which the owner had verbally agreed, was prepared and submitted to the owner and to his attorneys, who suggested certain changes therein. Thereupon a new draft of the contract was made in a few minutes by the owner and his attorney. This revised contract was executed by the purchasers and the sum of \$250 was deposited as earnest money in accordance with its conditions. Thereafter the

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owner refused to sign the contract and insisted that he could not sign unless an additional sum of \$4500 was deposited as earnest money, declaring that he had never agreed to execute the contract upon a deposit of \$500 being made. The preponderance of the evidence is to the contrary, and fairly shows that the owner had agreed to the proposed terms of sale as embodied in the contract.

It has been held repeatedly that a real estate broker who has found a purchaser at the price fixed by the owner who is ready, able and willing to purchase the property and to pay the purchase price, has earned the compensation agreed to be paid to him, even though the seller afterwards refuses to proceed with the transaction. Munroe v. Spier, 131 Ill., 126; Tilson v. Mason, 158 id., 304; Carnahan v. Leaser, 134 Ill. app. 370; Swigart v. Hawley, 40 id., 610. The compensation agreed to be paid the agent in this case was three per cent of the agreed purchase price, which is the amount of the judgment. We have carefully examined the numerous authorities cited by appellant in support of his contention that a commission is not payable unless a contract between the parties is actually executed. These authorities contain nothing contrary to the well established rule above stated. In fact, several of them expressly sustain this rule, although dealing with cases in which a contract had actually been executed. Fox v. Ryan, 240 Ill., 396; Wilson v. Mason, 158 id., 304.

We find no merit in appellant's contention that the proposed contract of sale would have been void for want of mutuality. With one exception the authorities cited by appellant in support of this proposition are cases relating to specific performance and deal with the essential requisites of a contract upon which that remedy will be allowed. This is not a bill for specific performance.

The judgment of the Municipal court is sustained fully by the law and the evidence, and will therefore be affirmed.
 Gridley, P. J., and Barnes, J., concur. AFFIRMED.

HENRY F. CLARK,
Appellee,
vs.
CHARLES WHITE,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McHILL DELIVERED THE OPINION OF THE COURT.

Upon a trial by jury in the Municipal court of Chicago appellee recovered a judgment against appellant for \$750 claimed to be due him as commissions in connection with the proposed sale of certain real estate in Chicago. Appellant concedes that the agent secured two persons as purchasers of the real estate and that these persons were ready, able and willing to purchase the property at the agreed price of \$25,000, but urges as reasons for a reversal that before a real estate broker is entitled to commissions he must not only secure a purchaser ready, willing and able to buy, but a valid contract of sale must be executed by the parties, and further, that the proposed contract of sale involved herein was void for want of mutuality.

The evidence shows that plaintiff is a duly licensed real estate broker in the city of Chicago; that with the consent of the owner he undertook to find a purchaser for the real estate owned by defendant at the price of \$25,000, which defendant agreed to accept. A contract embodying the terms of the sale, to which the owner had verbally agreed, was prepared and submitted to the owner and to his attorneys, who suggested certain changes therein. Thereupon a new draft of the contract was made in a form satisfactory to the owner and his attorney. This revised contract was executed by the purchasers and the sum of \$500 was deposited as earnest money in accordance with its conditions. Thereafter the

1. The first part of the report is devoted to a general survey of the situation in the country.	2. The second part is devoted to a detailed analysis of the economic situation.
3. The third part is devoted to a detailed analysis of the social situation.	4. The fourth part is devoted to a detailed analysis of the cultural situation.
5. The fifth part is devoted to a detailed analysis of the political situation.	6. The sixth part is devoted to a detailed analysis of the international situation.

THE ECONOMIC SITUATION IN THE COUNTRY

The economic situation in the country is characterized by a rapid growth of the national income.

The rapid growth of the national income is due to a number of factors. First, the country has a rich natural resources. Second, the country has a highly developed industry. Third, the country has a highly developed agriculture. Fourth, the country has a highly developed trade and commerce. Fifth, the country has a highly developed science and technology.

The rapid growth of the national income has led to a rapid growth of the standard of living in the country.

The rapid growth of the national income has also led to a rapid growth of the country's foreign trade.

The rapid growth of the national income has also led to a rapid growth of the country's military power.

The rapid growth of the national income has also led to a rapid growth of the country's cultural life.

The rapid growth of the national income has also led to a rapid growth of the country's political life.

owner refused to sign the contract and insisted that he would not sign unless an additional sum of \$4800 was deposited as earnest money, declaring that he had never agreed to execute the contract upon a deposit of \$500 being made. The preponderance of the evidence is to the contrary, and fairly shows that the owner had agreed to the proposed terms of sale as embodied in the contract.

It has been held repeatedly that a real estate broker who has found a purchaser at the price fixed by the owner who is ready, able and willing to purchase the property and to pay the purchase price, has earned the compensation agreed to be paid to him, even though the seller afterwards refuses to proceed with the transaction. Monroe v. Snow, 131 Ill., 136; Wilson v. Mason, 130 id., 304; Carruthers v. Hesser, 134 Ill. App. 570; Reinart v. Pawl, 40 id., 610. The compensation agreed to be paid the agent in this case was three per cent of the agreed purchase price, which is the amount of the judgment. We have carefully examined the numerous authorities cited by appellant in support of his contention that a commission is not payable unless a contract between the parties is actually executed. These authorities contain nothing contrary to the well established rule above stated. In fact, several of them expressly sustain this rule, although dealing with cases in which a contract had actually been executed. Fox v. Ryan, 340 Ill., 396; Wilson v. Mason, 130 id., 304.

We find no merit in appellant's contention that the proposed contract of sale would have been void for want of mutuality. With one exception the authorities cited by appellant in support of this proposition are cases relating to specific performance and deal with the essential requisites of a contract upon which that remedy will be allowed. This is not a bill for specific performance.

The judgment of the Municipal court is sustained fully by the law and the evidence, and will therefore be affirmed.
McIntosh D. F. and Barnes J. concur.
 AFFIRMED.

HENRY WEINSHAUSEN,
Appellee.

vs.

ARTHUR W. DICKINSON,
Appellant.

226 I.A. 643

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an action of assumpsit brought by appellee to recover commissions claimed to be due him for securing customers for the purchase of certain real estate belonging to appellant. The declaration indicates that plaintiff's claim was based originally upon several transactions, only one of which is involved in this appeal, which is from a judgment upon a verdict for \$480 in favor of plaintiff. Appellant urges a reversal for the reason that the judgment is contrary to the law and the evidence and on account of alleged errors of the trial court in giving and refusing instructions and in rulings upon evidence.

The evidence shows that appellant was the builder and owner of several houses in the village of Wilmette, one of which he sold to appellee in March, 1920. On or about the date of this sale there were several conversations between the parties with reference to the sale of the remaining houses and enlisting the services of appellee in obtaining customers therefor. As a result of these negotiations appellee referred appellant to one Gustave C. Martin as a possible purchaser. Thereafter appellant entered into a written agreement with Martin for the sale to him of one of the houses. It is admitted that appellant was brought into contact with Martin through the efforts of appellee, who had sundry interviews with Martin and with appellant upon the subject

prior to the execution of the agreement. The agreement in question was prepared by appellee. It was dated May 31, 1920, and in substance provided for the sale by appellant to Martin of a certain house in Wilmette for the sum of \$18,000. Appellant says that the price was reduced to that figure from \$18,500 by reason of the assurance given by appellee that Martin would pay for the same in cash. There was an existing encumbrance upon the premises of \$6500, which the purchaser agreed to assume as part of the purchase price. The contract recited that the purchaser had paid \$5,000 as earnest money to be applied on the purchase when consummated, and agreed to pay within five days after the title had been examined and found good or accepted by him the further sum of \$4500 after the completion of the premises and upon delivery of a good and sufficient general warranty deed conveying to the purchaser good title to the premises. It appears from the further recitals of the contract that sundry work on the building remained to be done by the vendor before the vendee would be required to make the further payment of \$4500.

The record further shows that Martin at all times contemplated the payment of the purchase price, with the exception of the mortgage assumed, by the delivery to appellant of certain oil stock at the par value thereof of \$5 per share. He testified that he acquired this understanding by reason of representations made to him by appellee. It is apparent that there were some negotiations regarding this method of payment, as appellant accepted the stock in satisfaction of the first payment of \$5,000 mentioned in the contract relying, as he asserts, upon the assurances of appellee that he would sell the stock for appellant within a few days. The contract contains no mention whatever of the proposed satisfaction of

its terms by the transfer of stock to appellant. Weinhausen apparently made some futile efforts to sell the stock in question for appellant. At a later period appellant notified Martin that he would not accept stock in satisfaction of the payment of \$1500 mentioned in the contract and that it was necessary for him to have this amount in cash as provided by the contract. Martin then stated explicitly that he was unable and unwilling to pay in cash. Dickinson reported this situation to Weinhausen and that Martin was unwilling to go on with the contract if he could not make his payments in oil stock. According to Dickinson's testimony, he then reminded appellee that no oil stock was to be accepted beyond that which had been received in satisfaction of the first payment of \$5,000, and that the remaining payment was to be made in cash. He says that he stated to Weinhausen that he was inclined to hold Martin to his contract but was dissuaded from doing so by Weinhausen, who advised him not to get into a law suit about the matter and that he had better forget the transaction, return the stock to Martin and call the contract off. Appellee stated that he was willing that this course should be pursued; that he would rather have it done than to incur any trouble about the matter. These statements, made by appellant, are not explicitly denied by appellee, and the contract was thereafter cancelled and the stock returned.

Upon this state of facts, appellee claims that he is entitled to his commissions on account of the proposed sale to Martin for the reason that he secured a customer who was willing, steady and able to purchase on the terms made by the principal and with whom the principal had entered into a valid, enforceable contract for the sale of the premises, uninfluenced by misrepresentation by appellee, thereby accepting the customer as ready, willing and able to purchase upon the terms of the contract; that by securing this customer he had earned his commission, of which

he cannot be deprived by the subsequent failure of the customer to carry out the contract. The general proposition for which appellee contends is sustained by numerous decisions in this state (Fox v. Ryan, 340 Ill. 391; Filson v. Mason, 188 id. 304; Carr v. Butterworth, 219 Ill. App. 14), and must be accepted as a correct statement of the law governing the payment of commissions on the sale of real estate.

The sole question for determination in this case is, whether or not the circumstances surrounding the transaction between Martin and Dickinson were such as to render the rule inapplicable. Appellant contends that plaintiff was not entitled to a commission because there was no meeting of minds between vendor and vendee as to the terms of payment for the real estate, and that the contract was executed by the parties under a misapprehension inspired by appellee's representations to appellant that the purchase would be for cash, and that if he accepted oil stock in lieu of cash, the same could be sold speedily and to Martin that the payments could be made in oil stock. Appellant relied upon the contract and believed himself entitled to the payment of \$4500 in cash, and Martin relied upon the representations made by appellee that the payments might be made in oil stock, which seemed to be supported by the fact that Dickinson had accepted such stock in lieu of a cash payment of \$5,000 upon execution of the contract.

The case at bar differs from the case of Fox v. Ryan, supra, in which it was held that where the vendor had accepted a purchaser by entering into a contract of sale to him, the vendor cannot defeat the broker's commissions upon the ground that the purchaser was not able to buy the property. In that case there was no proof that the failure of the purchaser to comply with his contract was due to financial inability, which is not the situation in the case at bar, as Martin declared that he was unable and unwilling to make the payment of \$4500 in cash. There is a further

he cannot be relieved by the undersigned. Failure of the company to carry out the contract. The general proposition for which supplies furnished is explained by numerous decisions in this state (The v. Wright, 140 Ill. 201; Johnson v. Wright, 132 Ill. 201; Wright v. Wright, 132 Ill. 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 100

distinction to be made between the cases, in that in the bon case the vendor retained the initial payment of \$4,000 and cancelled the contract of purchase uninfluenced by the financial ability, or absence thereof, of the purchaser to pay the balance, while in the case at bar the payment was returned by the vendor with the knowledge and tacit, if not express, approval of appellee. This action seems to indicate a belief on the part of both Dickinson and Weinhausen that Martin had executed the contract under a misapprehension as to the terms of payment and that it would not be advisable to attempt to enforce the contract against him or to hold his initial payment as liquidated damages and use the same in defraying the vendor's expenses, including the payment of commissions.

The case of Wilson v. Wilson, supra, holds that a broker has earned his commission when he has produced a purchaser ready, willing and able to complete the purchase as proposed, and that he cannot be deprived of his commission through the inability of the vendor to make a good title. It was said in that case that if the vendor rejects the purchaser so produced, the broker is bound to show that the purchaser was willing, ready and able to perform the contract according to the proposed terms. While the plaintiff in the present case was not a broker, he was performing the functions of a broker, and when informed of the purchaser's inability and refusal to make the payment of \$4500, he acquiesced in the cancellation of the contract and the return of the first payment. Other authorities cited by appellee are distinguishable from the present case in various features, which we do not consider it necessary to set forth in detail.

The record in the case at bar shows that the purchaser was not ready, willing and able to complete the contract upon the terms proposed, but that on the other hand, he was both unable and unwilling to make a cash payment of \$4500, as required by the

the following: in some cases the money is paid in the form of a loan, in some cases it is paid in the form of a grant, and in some cases it is paid in the form of a contribution. The money is paid in the form of a loan when the recipient is required to repay the money at a later date. The money is paid in the form of a grant when the recipient is not required to repay the money. The money is paid in the form of a contribution when the recipient is not required to repay the money and the money is not paid for a specific purpose. The money is paid in the form of a loan when the recipient is required to repay the money at a later date. The money is paid in the form of a grant when the recipient is not required to repay the money. The money is paid in the form of a contribution when the recipient is not required to repay the money and the money is not paid for a specific purpose.

The money is paid in the form of a loan when the recipient is required to repay the money at a later date. The money is paid in the form of a grant when the recipient is not required to repay the money. The money is paid in the form of a contribution when the recipient is not required to repay the money and the money is not paid for a specific purpose. The money is paid in the form of a loan when the recipient is required to repay the money at a later date. The money is paid in the form of a grant when the recipient is not required to repay the money. The money is paid in the form of a contribution when the recipient is not required to repay the money and the money is not paid for a specific purpose.

The money is paid in the form of a loan when the recipient is required to repay the money at a later date. The money is paid in the form of a grant when the recipient is not required to repay the money. The money is paid in the form of a contribution when the recipient is not required to repay the money and the money is not paid for a specific purpose. The money is paid in the form of a loan when the recipient is required to repay the money at a later date. The money is paid in the form of a grant when the recipient is not required to repay the money. The money is paid in the form of a contribution when the recipient is not required to repay the money and the money is not paid for a specific purpose.

terms of the contract. The conclusion is unavoidable that plaintiff did not comply with the conditions imposed by the sale upon which he relies, because his proposed customer was not ready, able and willing to purchase upon the agreed terms. Appellee acquiesced in this conclusion and made no effort to assert or prove the ability of Martin to consummate the contract. For this reason we must hold that appellee is not entitled to a commission upon the proposed sale, which was not made owing to the fact that the purchaser was not ready, willing and able to perform his part of the contract as to the terms of payment. As the record fails to show that appellee has earned and is entitled to his commission, it will be unnecessary for us to consider the other grounds for reversal urged by appellant.

The judgment of the County Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Barnes, J., concur.

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FINDING OF FACT.

We find as an ultimate fact in this case that plaintiff did not secure a customer ready, willing and able to purchase the real estate in question upon the terms proposed by the vendor.

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ADAMS AND ELTING COMPANY,
a corporation.

Appellee.

vs.

W. P. NELSON COMPANY,
a corporation.

Appellant.

22614.643

APPEAL FROM

SUPERIOR COURT.

COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff, who is appellee here, brought action in assumpsit to recover the balance alleged to be due upon an open account for paint sold and delivered by plaintiff to defendant and used by the latter during the year 1915 in doing the painting work upon a building then being constructed in Chicago. There was a jury trial resulting in a judgment for \$2,324.21 in favor of plaintiff, from which this appeal has been prosecuted. No question is presented as to the price, quantity or delivery of the paint in question, the defense to the action being based solely upon an alleged express warranty as to one of the paints known as "mill white undercenter" and the breach thereof by plaintiff. A reversal is sought upon the ground that the judgment is contrary to the law and the evidence and for the further reasons that the trial judge erred in his rulings upon questions of evidence and in giving and refusing to give sundry instructions to the jury and that the arguments to the jury on behalf of plaintiff contained violent, abusive and inflammatory language which was calculated to create in the minds of the jurors passion and prejudice against defendant.

The evidence shows that defendant was the contractor

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for the painting work upon the building in question under a written contract, which required that the work should be done and the materials used should be in conformity with the architect's plans and specifications. These specifications directed that all materials used should be as manufactured by plaintiff and that where "Adelite brand" is mentioned, the same shall be as manufactured by plaintiff or of an equal grade approved by the architect. The contract was dated July 15, 1918. Prior to this date and while defendant was preparing to submit its bid, one of its estimators had an interview with a salesman in the employ of plaintiff as to the materials required. The estimator testified that at this interview the salesman stated that one gallon of plaintiff's mill white undercoater would cover three or four squares of surface, a square being one hundred square feet, and that plaintiff's undercoater "was equal to other mill whites of the same character for the same use and the same price;" also that later in July and after the contract had been awarded to defendant, there was another interview between the same parties at which the amount of material required for the job was discussed and an order was given for such number of gallons as the salesman thought would be sufficient for the entire job. It appears elsewhere in the evidence that this order was for five hundred gallons and that the surface to be painted contained approximately 2500 squares. Hence we conclude that it was not contemplated by defendant that the initial order of five hundred gallons included all of the undercoater required for the job, even upon the theory that one gallon would cover from three to four squares. Defendant contends that the statements made by the salesman at these two interviews constitute an express warranty to the effect that one gallon of plaintiff's undercoater would cover from 300 to 400 square feet

of surface and that it was equal to other mill white undercoaters of the same character and price. This is the only testimony tending to sustain defendant's theory of the case.

Plaintiff's salesman, Louis Ambler, testified that his first and only conversation with defendant's estimator was on Saturday, July 27, 1918, which was after the contract had been awarded to defendant. He denied explicitly the statement attributed to him that one gallon of plaintiff's mill white undercoater would cover from three to four squares and the further statement to the effect that plaintiff's mill white undercoater was equal to other undercoaters of the same character and price. He stated that the order for 800 gallons was given at that time and defendant's estimator then stated that said order was only preliminary and that additional material would be required as the job advanced.

The evidence further shows that early in August a sample of plaintiff's undercoater was obtained and a satisfactory test of it was made. This was before any paint was applied to the building. No claim is made that the paint furnished was not equal to the sample. The paint was delivered early in September, 1918, and upon being used, was found to cover on an average a little more than two squares of surface to the gallon. No complaint was made on that account. No request was ever made of the architect to permit the use of a different kind of paint. Subsequently defendant ordered from plaintiff and received and used 1036 gallons of the same paint. Partial payments were made by defendant to plaintiff on account of the material furnished on this job of \$1100 November 27, 1918, and \$1800 December 23, 1918. In connection with the last payment, defendant requested plaintiff to execute a lien waiver, which was done by plaintiff as a matter of accommodation to defendant, and to enable the

latter to obtain a partial payment on account of the contract. These facts tend to show that the paint was satisfactory and that defendant had no thought of claiming damages for the breach of any warranty regarding it.

We think the jury was correct in its conclusion that there was no express warranty of the paint, as contended by defendant, and that even if there existed such a warranty the breach of it had been waived by defendant's action in placing additional orders for the paint after testing its quality by using the first 500 gallons thereof and its use of the materials without complaint and without any attempt to obtain the architect's permission to use any different kind of paint. Evans v. Howell, 211 Ill. 85; Hartford Deposit Co. v. Calkins, 186 id. 104.

The evidence further shows that the covering capacity of paint depends largely upon the character of the surface to which it is applied and the manner of its application. Consequently, even if it be admitted that plaintiff's salesman made the statements attributed to him, they did not amount to a warranty that the paint in question would cover three or four squares of surface under any and all circumstances. The statement was general in its character, and so far as the record shows may have been true, even if the paint as applied by defendant to this particular building failed to show the covering capacity stated.

It is urged by defendant that the trial court should have permitted defendant to introduce evidence as to the covering capacity of other similar paints. We do not think that the trial judge erred in this respect, as it does not appear that any test of the covering capacity of other paints had been

made under conditions similar to those under which plaintiff's paint was used in connection with this particular job. No offer was made to show the result of any comparative tests as to the covering capacity of other paints used under similar conditions. We are of the opinion that there was no reversible error in the rulings of the trial court upon questions of evidence and that the instructions given by the court fairly stated to the jury the law applicable to the case.

It is also urged on behalf of defendant that arguments to the jury made on behalf of plaintiff were for the purpose of arousing the prejudices or passions of the jury or to insult or abuse witnesses or parties and that the language used was of such violent, abusive and inflammatory character as to be prejudicial to defendant. While we do not approve of many of the expressions used by counsel for plaintiff in his argument, yet we cannot say that under prior decisions of the courts of this state they warrant a reversal. It does not appear from the record that defendant asked for or obtained any ruling from the trial court based upon these offensive utterances. Defendant preserved no exception to any ruling thereon. For this reason we are not at liberty to consider defendant's contentions in that respect. City of Salem v. Webster, 192 Ill. 369; Sturrock v. Morris, 177 Ill. App. 514.

The judgment was not contrary to the manifest weight of the evidence, and finding no reversible error in the record, it is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

422 - 27380

JOHN J. EDWARDS, Appellee,

vs.

JAMES GORDON, Appellant.

226 L.A. 643

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MERRILL DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer to recover possession of a four story brick and stone building known as No. 21 West Superior street in the City of Chicago. The suit was commenced June 16, 1921. At that time defendant was in possession holding over after the expiration of a lease from the owners dated May 1, 1918, for a term commencing on that date and expiring May 1, 1921. Plaintiff claimed and proved his right to possession under a lease from the owners, dated April 23, 1921, for a term commencing May 1, 1921, and ending April 30, 1924. It is contended by appellant that he was entitled to remain in possession of the premises by virtue of the fact that he had received an unsigned notice from the owner advising him of the expiration of his lease on April 30, 1921, and that appellant would be required to surrender possession of the demised premises on that date.

The statute provides in substance that the action of forcible detainer lies when a lessee holds possession after the determination of the lease or tenancy by its own limitation. Par. 4, sec. 2, chap. 57 R. S. It has been held repeatedly that under this statute a demand for possession before bringing an action of forcible detainer against a tenant holding over is not necessary. Condon v. Brockway, 157 Ill. 90; Travis v. Geiger, 215 Ill. App. 451. The delivery of the unsigned notice

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to the tenant was useless and unnecessary, and the court was right in refusing to receive the same in evidence. No defense to the action was shown upon the trial.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

It is the duty of the State to maintain the peace and order of the State and to protect the rights of its citizens. It is the duty of the State to maintain the peace and order of the State and to protect the rights of its citizens.

The Government of the State of New York is composed of the Governor, the Senate, and the Assembly.

Article 1

Section 1. The Legislative power of the State shall be vested in the Senate and the Assembly.

463 - 27421

BEN LINTON,
Appellee.

vs.

C. BARNHORN COOK,
Appellant.

226 I.A. 643

APPEAL FROM

CIRCUIT COURT OF

COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

An automobile belonging to plaintiff was being driven by his chauffeur in a southerly direction on the west side of Judson avenue, a north and south street in the City of Evanston, and defendant was driving his automobile in a westerly direction on the north side of Davis street, an east and west street in said city. The cars collided at about the center of the intersection of the two streets. Plaintiff sued for damages to his car and obtained a judgment for \$176.50. Appellant seeks a reversal upon the ground that the verdict was contrary to the weight of the evidence, both on the question of the exercise of due care by plaintiff and negligence by defendant. The accident occurred at about five o'clock in the afternoon of December 26, 1919. The surface of the streets was slippery, being covered with ice and snow.

On the date of the accident there was no statute in force in this state giving to either of the parties the right of way at the crossing; therefore neither of them had the right of way to the exclusion of the other. Both were bound to proceed with due care so as to avoid a collision. Their rights were correlative. Hilton v. Isaman, 213 Ill. App. 355. The driver of an automobile upon a city street is bound to use reasonable and ordinary care to have his car under such control as to enable him to avoid a collision. Sullivan v. Ohlhauser, 291 Ill. 369.

We have carefully reviewed the evidence in the case and find that there is but little conflict in the testimony of the various witnesses. Plaintiff's chauffeur was the only witness testifying on behalf of plaintiff as to the circumstances under which the accident occurred. He stated that when he was driving his employer's car in a southerly direction on Judson avenue at a speed of about eighteen miles per hour, he saw defendant approaching from the east at a distance of about 350 feet. The chauffeur driving plaintiff's car made no attempt to lessen his speed as he approached the street crossing, and continued, without any apparent effort to avoid a collision, for about half a block south of the street intersection. His statement in that respect is corroborated by the three witnesses who testified on behalf of defendant. Plaintiff's witness also stated that he thought defendant's car was being driven at a speed of about thirty-five miles an hour, but he admitted on cross examination that his estimate of the speed was very uncertain. He also testified that defendant's car struck the car that he was driving on its left hand side, causing the damages for which plaintiff recovered in the court below. There is no dispute as to the amount of damages to plaintiff's car.

Defendant testified in his own behalf that he was driving his car westerly on Davis street at a speed not exceeding eighteen miles an hour; that it was impossible for him to have attained a greater speed because he had come to a full stop in turning to Davis street from Forest avenue, which is only one short block east of Judson avenue, and that in going from Forest avenue to Judson avenue the road is up a slight incline. Defendant's conclusion as to the rate of speed at which he was traveling seems to be reasonable. He further testified that as he approached Judson avenue and was about fifty feet east thereof, he saw plaintiff's automobile proceeding down Judson avenue north of the

street intersection; that he at once applied his brakes and brought his car to a standstill at the middle of the street intersection, at which point it was struck by plaintiff's car. Defendant's car was turned completely around twice by the force of the collision and thrown against a lamp post. Defendant's statement as to the circumstances under which the accident occurred and his effort to avoid a collision and that his car was standing still at the time of the accident, is corroborated by two disinterested witnesses, who saw the accident. Both of them testified that defendant applied his brakes as he approached Judson avenue and brought his car to a stop at the middle of the street intersection and that defendant's car was standing still when it was struck by plaintiff's car, which continued on its course for a distance of about half a block after the accident.

It seems obvious that plaintiff's chauffeur made no effort whatever to avoid a collision; that he did not attempt to slacken the speed of the car he was driving as he approached the intersection and that he did not have his car under such control as to enable him to avoid the collision, which he might have done easily. We are of the opinion that he was guilty of negligence in operating his car, which contributed to the happening of the accident in question. Under these circumstances, plaintiff is precluded from a recovery. The verdict and judgment were contrary to the manifest weight of the evidence.

The judgment of the Circuit Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley, F. J., and Barnes, J., concur.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to provide any information on this subject.

[illegible]

The following information was obtained from the records of the Bureau of Investigation:

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463 - 27421

FINDING OF FACT.

We find as an ultimate fact in this case that plaintiff was guilty of negligence which contributed to the happening of the accident in question.

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LEE SNYDER,

Defendant in Error,

vs.

WILLIAM HARRISON BRADLEY,

plaintiff in Error.

223 I.A. 644

ERROR TO

CIRCUIT COURT

OF COOK COUNTY.

OPINION FILED JUNE 28, 1922.

Mr. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The complainant, Snyder, filed his bill in the Circuit Court of Cook County, alleging that he was a contracting plumber; that the defendant was the owner of certain described real estate of which one Greiner, was tenant and that Kerfoot & Company were the defendant's agents and as such, authorized to make contracts concerning the property in question; that said agents and the tenant had applied to the complainant for certain labor and materials involved in the installation of a steam boiler, and certain other things which need not be set forth in detail. The complainant further alleged that the work was done and that it was accepted and enjoyed by the tenant and said agents; that the complainant had been paid \$76.30 on account, leaving an unpaid balance due him of \$216.30, for which he filed a claim for a mechanic's lien, in the office of the clerk of the Circuit Court of Cook County, on June 25, 1919. The defendant filed an answer, denying that Kerfoot & Company were his agents for any purpose other than the renting of the property in question and the collection of rents; and that he had no knowledge as to whether the complainant had furnished

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his labor and materials as alleged in the bill of complaint. The answer further denied that the complainant had filed or caused to be filed in the office of the clerk of the Circuit Court of Cook County, any claim or bill which was effective to establish a lien against the interest of the defendant, in the property in question.

The case came on to be heard in the regular course before the chancellor and at that time the complainant and his counsel were present, but no one was present representing the defendant. The evidence was heard by the chancellor, and thereafter a decree was entered, finding that the complainant had furnished the labor and materials, as alleged, as the original contractor, by virtue of an agreement or contract entered into with Kerfoot & Company, the duly authorized agents of the defendant, who was the owner of the premises in question; and finding that there was due the complainant the sum of \$216.18, with interest thereon, at five per cent per annum, from August 28, 1918; and also, the decree proceeded to order the issuance of a certificate of indebtedness for the balance due the complainant, and concluded with the usual provisions of a decree establishing a mechanic's lien. To reverse this decree the defendant has sued out this writ of error.

In support of the writ of error the defendant first contends that the complainant did not prove the allegation of his bill, as to the agency of Kerfoot & Company; nor did he submit evidence to prove that he had filed a claim for mechanic's lien, as alleged in his bill, or that he had furnished the labor and materials as alleged. The complainant was the only witness. Not only was no evidence introduced on behalf of the defendant but no one was in court representing him, and no objections were,

therefore, interposed to any testimony of the complainant. Among other questions, the complainant was asked whether Kerfoot & Company were in charge of the property in question at the time the agreement with the complainant was entered into and he answered: "They were the agents." This testimony might have been subject to objection if one had been interposed, but inasmuch as that was not the case, the evidence stands in the record without objection and must be considered sufficient to make out at least a prima facie case, on the issue of agency.

There is sufficient evidence in the record on the question of the doing of the work and the furnishing of the labor and materials involved, to make out a prima facie case on that point.

At the close of his testimony, the complainant offered in evidence a statement which was marked, "Complainant's Exhibit 1," which seems to have consisted of the claim for lien, filed by complainant in the office of the Clerk of the Circuit Court of Cook County, to which were attached certain statements covering the work and materials in question, which, statements were marked as Exhibits A. to E. inclusive. The copy of this claim for lien, appearing in the bill of exceptions, does not contain any file mark indicating that it was filed or when it was filed. However, it is entitled, "In the Office of the Clerk of the Circuit Court of Cook County". Then follows the title of this case and the heading: "Claim for Lien". The first paragraph reads: "The claimant, Lee A. Snyder of Chicago, in the County of Cook, and State of Illinois, hereby files a claim for lien against William Harrison Bradley, of Fairfield County, Connecticut." This statement having been received in evidence by the chancellor, without objection, we deem it sufficient prima

fact proof of the fact that it was what it states it is, a claim for lien filed in the office of the Clerk of the Circuit Court of Cook County.

We find no error in the record and, therefore, the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

O'CONNOR, J. and TAYLOR, J. concur.

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THAT THE ONLY METHOD OF OBTAINING A
SUBSTANCE IN A PURE STATE IS BY
THE USE OF A SPECIAL APPARATUS.

156 - 27110.

GEORGE I. HAIGHT,

Appellee,

vs

LENA BELL,

Appellant.

226 I.A. 644

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

OPINION FILED JUNE 28, 1922.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was a proceeding in forcible entry and detainer, brought by the plaintiff George I. Haight, against the defendant, Lena Bell. The plaintiff having recovered judgment for possession, the defendant has perfected this appeal therefrom.

The plaintiff had leased the premises in question, an apartment located at 4727 Michigan Avenue, in the City of Chicago, to one W. F. Bell, the husband of the defendant. The lease was in writing and covered a period from May 1, 1918, to April 30, 1921, and from year to year thereafter until the lease should be terminated at the end of the first or any subsequent year, by either party giving the other not less than sixty days notice in writing, of such termination. The lease further provided that notice might be given by delivering a copy to the lessee in person, or by mailing a copy to the lessee at the address of the premises leased.

Notice of the termination of the lease was not made under the provisions as set forth in the lease, as to the manner in which such notice might be given but in the manner provided by the statute. On February 28, 1921, the janitor of the

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OPINION FILED JUNE 28, 1955.

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building called at the rear door of the apartment in question. A lady came to the door and the janitor asked for Mrs. Bell and she said that Mrs. Bell was not in. He then handed the lady a notice in writing, directed to E. F. Bell, informing him that his tenancy of the premises would terminate on April 30, 1931. The janitor asked the lady her name but she did not give it, but told him she would give the notice to Mrs. Bell. The janitor testified that he did not know who the lady was; that she was between twenty and thirty years old and that he had seen her before. On cross-examination he stated that she might have been a visitor. The court asked him how many times he had seen her and his answer was: "Weeks, probably a month."

On the trial of the case, the plaintiff called Mrs. Bell as a witness, under section 33 of the Municipal Court Act, and she testified that she was the defendant and the wife of W. F. Bell; that she was not then living with her husband and had not been since February 1930; that she paid rent to Mr. Carson of Mr. Haight's office; that she never notified either Mr. Haight or Mr. Carson that Mr. Bell was no longer living in the apartment. She denied that she had ever received or seen the notice of February 28, and that she never had any conversation with Carson in which a notice was discussed. Carson testified that he had a conversation with Mrs. Bell on March 30, when she called to pay the rent, and at that time she said she had received a notice and was going to move, and she mentioned that this would be the last rent she would pay; that he had another conversation, before the middle of April, with her, in which she said she was going to get another apartment. These remarks were denied by Mrs. Bell. The plaintiff testified that his reason for terminating the lease was that he desired to remodel the entire building.

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Testifying in her own behalf, the defendant denied the substance of her conversation with Carson, and testified to by him, and again testified to the fact that she had never received the notice of February 28, and never knew anything about such a notice. The only witness for the defendant was Mr. Odell, a lawyer, she testified as to a conversation with the plaintiff in September 1930, and another in the spring of 1931, when he told the plaintiff that Mrs. Bell desired to rent the premises for another year or two, and he said he could not rent it, "in view of the present conditions of rent being asked"; that he did not care to rent the premises to her but he had a friend to whom he wanted to rent and that he said nothing about wanting to remodel the building.

In rebuttal, the plaintiff testified that in his conversation with Odell nothing was said in regard to the Bell family staying in, at any price, and that in his second conversation with Odell he told him the premises could not be rented short of \$150.00 a month, except at a loss; that nothing was said with regard to wanting to rent the apartment to a friend.

While the defendant was on the stand under cross-examination, she testified there were about seven people living in her apartment, in addition to herself, on February 28, 1931. She was asked whether they were members of her family or boarders or roomers. Objection to this question was sustained. It should have been over-ruled, as the question was entirely proper.

In the first place, we are of the opinion that the plaintiff was entitled to possession of the premises as against the defendant, without the service of any notice, as her husband, the lessee, had abandoned the premises in February, 1930, and during the subsequent occupancy of the premises by the defendant,

the plaintiff had no knowledge that such abandonment had taken place and that the defendant was thereafter occupying the premises separate and apart from her husband.

Furthermore, there is specific evidence in the record to establish the proper service of a notice under the statute, assuming that one was required to terminate the tenancy on April 30, 1931. The testimony is sufficient to make out a prima facie case to the effect that the person with whom the notice was left was a woman between twenty and thirty years of age and was, at that time, residing on the premises.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, J. and TAYLOR, J. Concur.

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY

REPORT OF THE
COMMISSIONER OF THE
BUREAU OF CHEMISTRY
FOR THE YEAR 1907
PUBLISHED BY THE
GOVERNMENT PRINTING OFFICE
WASHINGTON, D. C.
1908

CHICAGO, ILL.
UNIVERSITY OF CHICAGO PRESS
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44-38984

FRANK F. THOMAS,
Defendant in error,

-v-

CHICAGO EMBOSSEING COMPANY, (corp.),
Plaintiff in error.

226 I.A. 644
Error in

Superior Court,

OPINION FILED JUNE 23, 1922.

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

Plaintiff brought suit against defendant to recover
damages for personal injuries claimed to have been sustained
by him while he was operating a dangerous power driven machine
in defendant's plant, the machine not being properly guarded
contrary to the statute. There was a verdict and judgment in
his favor for \$10,000.00, to reverse which defendant, presented
this writ of error.

The record discloses that plaintiff came to
defendant applying for employment stating that he was ex-
perienced on printing and embossing presses. He was employed
by the defendant and worked on a job press. About ten months
later, On August 12, 1911, he was put to work on an embossing
press after receiving some instructions from a representative
of defendant. After he had at work three or four hours on the
embossing machine his right hand was crushed in the machine so
that it was necessary to amputate the hand above the wrist.
The embossing machine was power driven. The lower bed of it
moved up against the upper bed which was stationary. The
material was placed on the lower bed, the power applied and
the lower bed moved upward and the impression was made on the
material. By this method the embossing was done. In operating
the machine the operator would sit in front of it on a high
stool. There was a place on part of the frame on which to rest
his left foot, but apparently there was no place where the
operator could rest his right foot. As the lower bed moved up

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and then there was what is termed in the record a plunger, which moved up and down in a slot and which was about three and three-quarters inches wide and from six to eight inches in length. In the operation the plunger would come within three-quarters of an inch of the bottom of the slot and the same distance from the top. In front of the machine and between it and the operator was a shelf or table on which the material that was being embossed was placed. The shelf extended across the machine and was about six or eight inches in width, and when the machine was being operated the shelf would be a little above the operator's waistline, so that the lower part of the machine and the operator's feet would not readily be seen by him when at work.. The operator would take a piece of material, place it between the two beds, and then by a lever, operated by the left hand, draw the lever and the lower bed would move up against the upper bed making the impression on the material.

Plaintiff's contention is that he had never operated an embossing machine before the date of the injury; that he was instructed briefly by a representative of the defendant and that after he had been operating the press for two or three hours he accidentally placed the toe of his left foot in the slot and as the plunger came down his toe was pinched; that in his excitement he threw forward his right hand upon the lower bed of the machine; that it moved upward and his right hand was crushed ~~down~~ between the upper and lower beds.

The defendant's position is that plaintiff's case, as shown by the declaration, was based on the improper working of the machine and the failure of the defendant to guard some of the drums, cogs and gearings of the machine, but that no mention was made of the plunger in the slot; that the first intimation defendant had that plaintiff claimed his toe was pinched in the slot was when the evidence was offered on the trial; that the court should have directed a verdict for the defendant because the allegations of the declaration were not sustained by the evidence.

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The declaration consisted of eight counts charging in substance that the machine was not properly oiled, that the lever did not release the clutch, that the machine was dirty, that plaintiff had complained to defendant and the latter had promised to have it cleaned; that the stool on which plaintiff sat while operating the machine was defective and dangerous to sit upon. All of these counts seem to have been expressly abandoned on the trial, so that the declaration on which the case was tried consisted of what is designated as an additional count. The allegations of this count are in substance that there was in full force and effect a certain statute providing for the guarding, fencing and protecting of fly-wheels, belting, shafting and moving parts of machinery; that it then and there became the duty of the defendant to comply with the statute and to see that the embossing machine, which was power driven, was properly fenced or otherwise protected "as to its frame, cogs, gearing, belting, shafting and fly-wheels, all of which it was then and there practicable to fence or guard." And it is alleged that the defendant failed in this regard; that the machine was located where it was dangerous to employees, and as a result of such failure, the plaintiff, while in the exercise of all due care and caution for his own safety, and while working upon the machine, came in contact "with said moving parts aforesaid" and by reason thereof plaintiff's arm and hand were so crushed and mangled as to require amputation. And it is argued that since it further charged failure to protect the frame, cogs, gearing, shafting and fly-wheels, and since no charge was made that plaintiff's feet were pinched in the slot by the plunger, the evidence tending to show that plaintiff's feet were pinched in the slot by the plunger does not sustain the charge made in the declaration and, therefore, the judgment should be set aside.

On the trial when evidence was offered tending to show how plaintiff was injured no objection was made nor was there any suggestion that the evidence was not supported by the allegations of the declaration. There was no indication that defendant was surprised at the proof offered, but on the contrary it affirmatively appears that defendant offered evidence tending to show that it was impossible for plaintiff to have had his toe pinched in the manner contended. Defendant further offered evidence tending to show that the toe was not at all injured, since no complaint was made to the surgeon who amputated the arm. Having endeavored to meet the evidence submitted by the plaintiff and without any suggestion that it did not come within the allegations of the declaration, we think the defendant is not in a position now to urge the point here for the first time. Moreover, while the additional count is not very well drawn, we think it sufficient after verdict to sustain the judgment. It alleges in substance that it was the duty of defendant to properly guard the machine as provided by the statute; that the machine was dangerously located and dangerous to the operator; that it was feasible to guard it; that this was not done, and that plaintiff, while in the exercise of all due care and caution for his own safety, came into contact with the moving parts of it, and was severely injured. We think on the merits that the point is not well taken. If there was any variance and objection had been made, it might have been obviated by amendment. The variance was not even suggested, so that the contention the defendant now makes cannot be maintained. It further appears from the record that this case was tried once before and that the jury disagreed. On oral argument it was admitted by counsel for the defendant that the first trial was had about a month before the trial in which the present judgment was entered, and it was further admitted at that time that the plaintiff's contention, and his evidence submitted on the first trial, was substantially the same as on the second trial; that is, at each trial he contended that his toe was pinched in the slot. From this it is clear that the defendant could not have been taken by surprise on the second trial.

Defendant further contends that the case is without merit because it appears from an examination of the machine, photographs of which appear in the record, that it was impossible for plaintiff to have had his toe pinched by the plunger in the

slet. We have examined the photographs and testimony in this record, and have also, by agreement of counsel, inspected the machine, and so think it cannot be said that it was impracticable for plaintiff to be injured in the manner claimed. We cannot say upon a consideration of all the evidence and an examination of the machine that the finding of the jury in favor of plaintiff is against the manifest weight of the evidence. In these circumstances, of course, we cannot disturb the verdict. It clearly appears that the plunger could have been guarded and protected very easily so as to render it impossible for anyone to be injured by it, but this was not done as the statute requires. We think it clear that plaintiff could have been injured in the manner he testified he was.

Complaint is also made of the giving of the fourth instruction on behalf of plaintiff. That instruction told the jury that if they believed from the evidence that the proximate cause of plaintiff's injury was the failure of defendant to enclose or guard the machine and that this was a violation of the health, safety and comfort Act, then the jury would have no occasion to consider whether the plaintiff had assumed the risk or was guilty of contributory negligence if they believed from the evidence that it was practicable to enclose or guard the machine. It is insisted that this instruction was wrong because it assumed the machine was dangerous, which question should have been left to the jury. The instruction did not direct a verdict and, of course, if the defendant violated the statute, the defenses of assumed risk or contributory negligence were not available to it. Instruction 3 given at the request of the plaintiff set out in full the statute known as the health, safety and comfort Act. This statute provides that all machines such as the one in question, which are dangerous, shall be

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properly fenced and guarded where it is feasible to do so. In these circumstances, we think that instruction 4 was not improper, and certainly it cannot be said that it improperly affected the defendant on the trial since the jury was told at the request of the defendant that the statute required the guarding of only such machines as were dangerous to employees, and that if they believed from the evidence that the machine in question was not dangerous, then the law did not require it to be guarded. From this it is clear that the jury were specifically instructed that they must find from the evidence that the machine was dangerous, which cured the omission, if any, in plaintiff's instruction 4.

It is further contended that the court erred in refusing to give defendant's first, second and third proposed instructions. It is claimed that they were indispensable to a proper presentation of the case to the jury. It is not pointed out why it was improper to refuse the first instruction. The second was to the effect that if the jury believed from the evidence that plaintiff's foot did not slip or get into the slot or become pinched and crushed, plaintiff could not recover. We think this instruction was proper and should have been given. While it would have been more in accord with the evidence if the word "crushed" had been omitted, yet we think it should have been given in the form submitted, because it is true, as defendant argues, under the evidence in this case it is clear that plaintiff could not recover unless his toe got into the slot under the plunger. This is the whole theory of plaintiff's case. While the court should have given the instruction, we think it clear that the defendant was in no way injured by the court's refusal to do so, because upon a reading of the entire record it appears without question that the

plaintiff's wholly done was based on the claim that he put his foot into the slot which the defendant failed to protect as the statute required. The record discloses that no contention was made on the trial that any part of the machine was not protected or guarded, as provided by the statute. It was apparent, and the evidence showed without any controversy, that every part of the machine that could be guarded was guarded except the slot. And it was admitted on the trial that the machine worked properly, and the only complaint on behalf of the plaintiff was that the slot could have been easily protected by a guard, and this was not done. In these circumstances, assuming as we must that the jurors possessed the qualifications required by the statute, we must further assume that they clearly understood the issue, which was a very narrow and simple one. Consequently we think we would not be justified in disturbing the verdict where we are clear that the refusal of the instruction did not affect the result of the case. What we have said with reference to this instruction we think would be applicable to defendant's refused instructions 1 and 3, although they are not argued because they are in substance the same as the second instruction, which the court refused. We think there was no error in refusing these two instructions.

Defendant finally contends that the judgment should be reversed because of a controversy that took place between counsel for the plaintiff and the trial judge at the close of the evidence as to the length of time that should be allotted counsel for argument to the jury; that after this took place counsel and the court retired to chambers where the controversy was continued and where the matter was finally straightened out. The parties then came into the court room and the trial judge stated to the jury that he had been in

error in the matter and thereupon counsel for the plaintiff made an apology to the jury. We have read the entire record and do not believe that the error, if any, is sufficient to warrant a reversal of the judgment. No complaint was made by counsel for the defendant to anything that took place. Since we are unable to see and since counsel for defendant has failed to point out in what manner he was prejudiced by the incident, we think he would not be justified in disturbing the judgment in this court.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, J. concurs.
THOMPSON, JJ. dissenting:

I am unable to concur in the foregoing decision of this case. In my opinion it was reversible error on the part of the trial court to refuse the instructions designated as defendant's refused instructions 1, 2 and 3. As far as the first and third of these instructions are concerned, there would probably have been no reversible error if the court had refused one of them, provided the other had been given. The opinion of the majority is to the effect that as to instruction 2 it was proper and should have been given, but it was not such reversible error as to warrant this court in disturbing the verdict and judgment of the trial court.

In my opinion, this instruction was vital and went to the very heart of the plaintiff's case and the substance of it is not to be found in any of the given instructions. There are a number of reasons why the defendant should have had the benefit of this instruction. The plaintiff had suffered a severe injury - the loss of his right hand - and the injury had

been received while the plaintiff was operating one of the defendant's machines, which came within the provisions of the statute requiring dangerous machinery to be so guarded, wherever that is possible in its practical operation. The most dangerous part of this particular machine was the part in which plaintiff's hand was crushed, but it is conceded that it is not possible to guard that part of the machine and still operate it. But it is the plaintiff's theory that his foot slipped into the slot, referred to in the majority opinion, and when the plunger descended it pinched his foot, and he then, in an apparent effort to extricate his foot, got his right forearm into the press where it was crushed. It is to be noted that the plaintiff filed a declaration containing a number of counts based on theories having nothing whatever to do with the slot and plunger referred to, and not involving his foot in any way, and it was not until some time later that he filed the additional count based on the theory that his foot slipped into the slot and was pinched by the plunger. But even in the additional count no mention is made directly of the slot or the plunger or the injury to the foot. All the other counts were abandoned. These facts make it particularly important that it be made clear to the jury, in substance, that even though the plaintiff did suffer the crushing of his hand in the press at a point where it was not guarded, nevertheless he could not recover damages against the defendant in this case unless that injury was brought about by the fact that he did get his foot into the slot in question, and that his foot was pinched by the plunger, and unless this was the cause of his getting his hand into the press as alleged. That was the instruction which the defendant requested the court to give, designated as defendant's refused instruction 3, and as stated above, my opinion is that the court committed reversible error in refusing to give it.

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111-17081

AMIE MCCUE,

Defendant in error,

-vs-

THOMAS A. QUATTROCKI, et al.,

Plaintiff in error.

226 I.A. 644

Case No.

Superior Court,

Cook County.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Opinion filed June 28, 1922.

Plaintiff brought suit against Tony A. Quattrocki, August Quattrocki and Michael Quattrocki, doing business as Quattrocki Bros., and individually, to recover damages for personal injuries claimed to have been sustained by her by reason of being struck and knocked down by an automobile truck belonging to and operated by defendants. During the progress of the trial all of the defendants were eliminated from the case except Tony A. Quattrocki, whose correct name was Thomas A. Quattrocki, and the papers were all amended to show this fact. At the close of plaintiff's evidence defendant moved for a directed verdict, which motion was denied. Thereupon the case was submitted to the jury without any evidence being offered on behalf of the defendant, and there was a verdict and judgment in plaintiff's favor for \$7000.00, to reverse which Thomas A. Quattrocki prosecutes this writ of error.

The declaration on which the case went to the jury consisted of eight counts which charged that on May 22, 1920, plaintiff was injured while she was crossing Farnish Avenue in Chicago; that she was struck and knocked down by an automobile truck owned and operated by the defendant. The several counts charge that the machine was operated negligently and at an

463, 1992

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excessive rate of speed, and that while plaintiff was crossing the street in the exercise of due care and caution for her own safety, she was struck, thrown to the ground, and severely injured. Since no point is made in reference to the allegations of any of the several counts it is unnecessary to state anything further in regard to them. The defendant filed two pleas, one the general issue and the other a special plea denying that the defendant owned, operated or controlled the automobile on the occasion in question.

Defendant's position is (1) that he was entitled to a directed verdict because under the pleas the burden was on the plaintiff to prove that the defendant owned, operated and controlled the automobile on the occasion in question and that the plaintiff failed to meet this burden, and (2) that there was no evidence tending to show that at the time in question plaintiff was in the exercise of ordinary care for her own safety, or that the defendant was guilty of any negligence.

It is expressly stated by the defendant that no claim is made that the damages are excessive if the plaintiff is entitled to recover. It will, therefore, be unnecessary for us to state the nature of plaintiff's injuries except to say that they were of a most serious and permanent character, and certainly no argument could reasonably be made that the verdict of the jury was excessive if the defendant was liable. There is no complaint made as to the admission or exclusion of evidence, nor to the instructions, but defendant's position is confined solely to the two points above mentioned. It will, therefore, be necessary for us to discuss somewhat in detail the evidence offered by the plaintiff. Plaintiff was injured on the morning of May 22, 1918, shortly before eight o'clock. She was about 31 years of age at the time and was in good health. Her eyesight and hearing were both good. She was doing clerical work at the

1. The first step is to identify the problem or goal. This involves understanding the current situation, identifying the problem, and setting a clear goal. 2. The second step is to gather information. This involves researching the problem, identifying relevant data, and consulting with experts. 3. The third step is to develop a plan. This involves identifying the steps needed to solve the problem, prioritizing tasks, and allocating resources. 4. The fourth step is to implement the plan. This involves executing the tasks, monitoring progress, and making adjustments as needed. 5. The fifth step is to evaluate the results. This involves comparing the actual results to the goal, identifying areas for improvement, and documenting the process.

Boston Store, located at Madison and State streets, Chicago.

The morning was bright and fair. She lived on West Ohio Place, and, as was her custom, she boarded a North State Street car to go to her place of employment. When the car had reached Seventh street there was a blockade of the cars on account of a fire or some other obstruction in the downtown district. Plaintiff alighted from the State street car and intended to go to her work by way of Wabash Avenue, which is one block east of State. She walked east on the north sidewalk of Seventh Street to Wabash Avenue. This street is built up with business property. The Blackstone and Y.M.C.A. hotels are in the vicinity. In Wabash Avenue there is a double line of street car tracks. Immediately east of Wabash Avenue on the south side of Seventh street was a cab stand opposite the Blackstone Theatre. At that time in the morning there was considerable traffic at the intersection of Wabash Avenue and Seventh Street. When plaintiff reached the northwest corner of that intersection she intended to walk across Wabash Avenue on the north cross-walk. Before going so she looked to the north and saw an approaching toward her a street car and in the rear of this a wagon drawn by a horse. She looked to the south and on the east or northbound track two street cars were approaching. The car coming south passed by her, as did the first one coming north. When these two cars had passed she stepped into the roadway of Wabash Avenue walking east across the street on the north cross-walk. Then she was at about the first street car track she again looked to see what traffic there was. She noticed that the second street car, which she had seen before stepping into the roadway, coming north on the east-bound track, was about a half block south of Seventh street, and that the conductor was endeavoring to adjust the trolley pole which had gotten off the wire, and that none of the cabs at the stand

corner of the intersection were moving about. She then thought she had plenty of time to walk across the distance of the street and proceeded. When she was somewhere about the east or north-bound track she was struck and knocked down and severely injured, although she testified that she was not at the time rendered unconscious. She did not see the automobile truck nor did she know what struck her. She endeavored to get up but was unable to do so as one of her legs was fractured. She was taken by some employees of the city to St. Luke's Hospital where she remained for several months and underwent three severe operations. Her injuries were very severe and permanent. This is the substance of plaintiff's testimony.

A Mrs. McGarrin testified for plaintiff that on the morning in question she was walking downtown to Rothschild's Store at State and Van Buren Streets, where she was employed; that at the time of the accident she was walking north on the west sidewalk of Wabash Avenue and about 75 feet north of Seventh Street when she heard someone scream or shout, and she turned and looked in the direction from which the sound came; that she looked toward the southeast and saw plaintiff floundering in the street endeavoring to get up but that plaintiff was unable to do so. At that time she saw a Dundas motor truck about 25 feet north of where the witness was standing, which would be about 100 feet north of Seventh Street; that its front wheels were turned to the northwest and near the center of the street, but that the witness was unable to state whether the truck was stopped or moving at the time; that she then turned and went to her place of employment; that she did not know plaintiff or anyone connected with the case, but that some weeks afterward the witness's daughter, who was about 15 years of age, was ill and was taken to St. Luke's Hospital;

that she was placed in a ward with three or four other persons, one of whom was the plaintiff; that in speaking to the plaintiff the witness was informed by the plaintiff that she had been injured at Wabash Avenue and Seventh Street, and that witness then stated she had seen the accident. Plaintiff also on 1st August Quattrocki, who at the time was still a defendant in the case. He testified that on the date of the trial, which was nearly two years after the accident, he was 32 years old; that he was employed by the defendant, Thomas A. Quattrocki, his brother, to drive the latter's Sanborn truck; that he was driving this truck in May, 1919; that it was a one and one-quarter ton truck; that he had been driving the truck about two months before the date of the accident; that on the date of the accident he was driving the truck for his brother to South Water Street to get a load of vegetables, which was a daily task. He was then asked by counsel for plaintiff: "Q. Were you driving that truck north on Wabash Avenue on the morning of May 21, 1919, when there was an accident in which this lady who sits back here (pointing to lady) was involved? A. So I understand, yes sir. Q. Did that truck at that time have a license? A. Yes. Q. What was the number of it. A. I do not remember the license, the hospital reports have that." The witness was not cross-examined by counsel for defendant. Plaintiff also called the defendant, Thomas A. Quattrocki, as a witness. He testified: "I own the automobile truck which is involved in this accident. I owned it in May, 1919. * * * I employ my brother August as a chauffeur for the operation of that truck. No other person had any interest in the business which I conducted in May, 1919, or in the operation of the truck." This witness was not cross-examined by counsel for the defendant. Thomas F. Shortall, a witness for the plaintiff, after qualifying as an expert in the

driving of automobiles and particularly of trucks like the one in question, testified that a similar truck with good brakes and going at the rate of 10 miles per hour could be stopped within 10 feet, and that if it was going at the rate of 15 miles per hour it could be stopped within 15 feet; that the greater the rate of speed the greater would be the distance required within which to stop it. This is substantially all the evidence except the medical evidence, which it is not necessary to discuss, no question being raised in reference to the amount of the verdict nor to the testimony given by the doctors.

We think the evidence clearly made out a prima facie case that it was the defendant's truck that struck and injured the plaintiff and that it was being operated by the defendant through his servant at the time in question. It seems idle to say, under the evidence above set forth, that plaintiff had not met the burden imposed upon her by reason of the special plea. But defendant is in no position to argue this point here because the court gave, at his request, instructions which assumed that the truck at the time in question was owned and operated by defendant, and having taken that position at the trial, he ought not now be allowed to shift his position in a court of review. The court at the request of defendant, gave the jury the following instructions: (1) "You are instructed that August Quattrocki, the driver of the vehicle on the occasion in question, was not required by law to exercise the highest degree of care possible to human diligence to avoid the accident, but was only required to exercise ordinary care or such care as is ordinarily exercised by a reasonably prudent person under the same or similar circumstances as shown by the evidence: nor did the law require August Quattrocki to exercise any higher degree of care for the plaintiff than it required of the plaintiff to exercise for herself."

By another instruction the jury were told that on the occasion in question the law did not require the defendant to anticipate or guard against dangers not reasonably to be expected, and that if the jury believed from the evidence that the accident in question was unusual and not to be reasonably anticipated by the defendant in the exercise of ordinary care, then the plaintiff could not recover. It will be seen that these instructions assume that the vehicle that struck plaintiff belonged to the defendant, but that he was not required to exercise the highest degree of care to avoid injuring the plaintiff, nor was he required to guard against unexpected occurrences. In these circumstances, we think defendant cannot now be heard to contend that the evidence did not show that defendant owned and controlled the automobile at the time in question, because both these instructions warrant the assumption that he did. Moreover, if the defendant was not the owner or in control of the truck that struck plaintiff, this could have been easily shown by the defendant and his witnesses, because August Quattrochi testified he was driving the truck in Wabash Avenue at the time of the accident.

Nor do we think it can be successfully contended that all reasonable minds would reach the conclusion that plaintiff was guilty of contributory negligence and, therefore, barred from recovery. In these circumstances, of course, the question was proper for the determination of the jury. Plaintiff's testimony as to what she did at and prior to the time in question indicates that she was looking out for her own safety; that before she stepped into the roadway of Wabash Avenue she looked to the north and to the south

and saw that traffic there was in the street; that after the car from the north and the car from the south had passed her she stepped into the roadway and when she reached a point somewhere about the west car track she again looked and saw a street car on the northbound track about one-half block south of Seventh Street, and she then assumed that she had ample time to cross the street, since the trolley bells rang off the wire; that her attention was diverted in watching the taxicabs at the southeast corner of Seventh Street and Wabash Avenue. Furthermore the evidence tends to show that the truck was going at an excessive rate of speed, because when it apparently stopped after striking plaintiff and knocking her down, it was 100 feet north of the point where she was struck. And when we consider the undisputed evidence that a truck traveling 10 to 15 miles per hour can be stopped within 10 or 15 feet, the jury might well be warranted in finding that the truck was going at a greater rate of speed than was permitted by the State law under the circumstances. And they might also well have considered the state of the traffic and what plaintiff testified she did and found that she was in the exercise of ordinary care for her own safety. In these circumstances, of course, the question must be submitted to the jury as was done by the trial judge. We think this record is exceptionally free from error, and the judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON, F.J. and TAYLOR, J. concur.

The first thing I noticed when I stepped out of the car was the
 warm, humid air. It felt like a giant hand reaching out to
 embrace me. I took a deep breath, savoring the scent of
 tropical flowers and the salty tang of the ocean breeze.
 The sun was shining brightly, casting a golden glow over
 everything. I could see the palm trees swaying gently in the
 breeze, their fronds creating a rhythmic pattern against the
 sky. The sound of the waves crashing against the shore was
 soothing, a constant reminder of the vastness of the world.
 I walked along the beach, feeling the soft sand beneath my
 feet. The water was crystal clear, and I could see the
 colorful coral reefs just below the surface. I took a few
 steps into the water, feeling the coolness of the sea.
 The sun was low in the sky, painting the clouds in
 shades of orange and pink. The air was still, and I
 could hear the distant call of a seagull. I closed my eyes
 and breathed in the fresh air, feeling a sense of peace
 and tranquility. This was exactly what I needed. I was
 finally in a place where I could relax and enjoy the simple
 pleasures of life. The sun set behind the horizon, and the
 stars began to appear in the dark sky. I sat on the
 beach, watching the moon rise over the ocean. The world
 was so beautiful, and I felt so lucky to be here. I took
 another deep breath, feeling the warmth of the sun on my
 face. This was my escape, my sanctuary. I was finally
 home.

ALEXANDER EISENSTEIN and
SAMUEL EISENSTEIN,
Petitioners-Appellees,

vs.

CITY OF CHICAGO et al.
On Appeal of CHARLES HORTON,
Commissioner of Buildings of
the City of Chicago,
Respondent-Appellant.

226 I.A. 644

APPEAL FROM SUPERIOR COURT OF
COOK COUNTY.

MR. PRESIDING JUSTICE KENNEDY
DELIVERED THE OPINION OF THE COURT.

This is a suit in which petitioners ask for a writ of mandamus commanding the Commissioner of Buildings of the City of Chicago to issue to petitioners a building permit for the erection of a certain apartment building in Chicago. General and special demurrers were filed, which were overruled by the trial court, and defendant electing to stand by the demurrers, the court ordered and adjudged that the writ of mandamus be issued, ^{which} ~~from~~ order defendant appeals.

This suit is governed by what is held in People v. Masser, 248 Ill., 11. It was there held that before the petitioners could lawfully erect the building the ordinance must be pleaded showing a legal duty on the part of defendant to issue the building permit, and the petition must also state facts showing compliance with all of the requirements of such ordinance in order to show a clear right on the part of appellant to demand said permit; that allegations that petitioners have complied with the ordinance are mere legal conclusions not admitted by demurrer.

Defendant asserts the failure of the petition in the instant case to allege the performance of a number of prerequisites in the building ordinance necessary to entitle petitioners to a per-

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mit. The most important of these is the failure of the petitioners to comply with section 232 of the Building Ordinance, which is as follows:

"Such applicant shall produce evidence that he has filed with and had approved by the Commissioner of Public Works of the City an indemnifying bond protecting the city against any and all damage that may arise to the streets or alleys upon which such building abuts, and to the city, and to any person in consequence or by reason of any obstruction or occupation of any street or sidewalk in and about said operations."

This is certainly material, but petitioners in this court make no suggestion explaining their failure to allege performance of this requirement. Another failure asserted is the omission of an allegation showing compliance with section 233 of the Building ordinance requiring that the Commissioner of Buildings, as a condition to a permit, should have evidence that the applicants will pay for city water used in the construction of the building or for ³water meter measuring the same. The omission of allegations of performance of these requirements are in themselves fatal to the right of petitioners to the writ of mandamus.

Defendants assert a number of other particulars in which it is said the petitioners have failed to show compliance with the building ordinances. Some of these may be over-technical, but no good reason is presented to show why petitioners should not have met these objections. It occurs to us that as the demurrer was special, petitioners should have amended their petition so as to comply with these matters of form. If, however, they have in fact failed to comply with the substantial provisions of the building ordinance referred to, no amendments could cure such omissions.

Petitioners having failed to show a clear right to the writ, the trial court should have sustained the demurrers.

The judgment in favor of the petitioners is therefore reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Dever and Hatchett, JJ., concur.

the most important of these is the fact that the Commission is not a permanent body, but is appointed for a limited period of time, and its members are not elected by the people.

It is also true that the Commission is not a permanent body, but is appointed for a limited period of time, and its members are not elected by the people.

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This is a serious matter, and it is one that should be taken into consideration.

It is also true that the Commission is not a permanent body, but is appointed for a limited period of time, and its members are not elected by the people. It is also true that the Commission is not a permanent body, but is appointed for a limited period of time, and its members are not elected by the people.

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The Commission is not a permanent body, but is appointed for a limited period of time, and its members are not elected by the people. It is also true that the Commission is not a permanent body, but is appointed for a limited period of time, and its members are not elected by the people.

140 - 27615

OTTO H. WYLAND,
Plaintiff-Appellant.

vs.

ETHEL A. CURTRELL,
Defendant-Appellee.

226 I.A. 645

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MEMORRELY
DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from a judgment against plaintiff in a replevin suit.

The ownership of property in plaintiff is not in question; only the right of possession is in dispute.

The evidence tends to show that plaintiff, after the death of his wife, moved some of his household effects, including the property in question, to the home of defendant, where he boarded; that he was taken ill and went to a hospital; that while there defendant persuaded plaintiff to sign a writing dated November, 1930, which stated that the defendant could have the use of his household goods at her home "for two years, ending 1932." Subsequently plaintiff made a demand for the return of the goods, which was refused and this replevin action followed.

As the bailment was gratuitous, plaintiff had the right to terminate it at any time. Benett v. O'Brien, 37 Ill., 250. Plaintiff was entitled to the return of his goods upon demand. It follows, therefore, that the judgment in favor of defendant was erroneous, and it is reversed and the cause remanded.

REVERSED AND REMANDED.

Dever and Matchett, JJ., concur.

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349 - 27307

ALFRED A. MORTON and
JOHN BROWN,

Appellants,

vs.

CARL EDWARD,

Appellee.

226 I.A. 645

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

Appellants brought suit for a balance of \$1400 claimed to be due them for services rendered appellee as attorneys in a certain suit entitled Edward v. O'Hourke. An attachment was also sued out. On both issues the verdict was for appellee, and the appeal is from the judgment entered thereon.

appellee was a minority stock holder of a corporation organized by him, one Olson and said O'Hourke. The latter, having obtained Olson's stock, secured control at a stock holders meeting and ousted Edward from his position as treasurer of said corporation. Claiming unlawful use of the moneys of the corporation to obtain such stock and control, Edward consulted appellant Morton, who with appellant Brown became his legal advisers in the matter and instituted proceedings in equity for Edward and associate stock holders. It was for services rendered in that suit for which this suit was brought. The value of such services and whether there was any agreement as to the amount of fees Edward was to pay were the controverted questions.

The statement of claim was based also on an account stated, but our attention is not directed to evidence that

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would sustain a count therefor.

Appellants' main contentions are that the verdict was against the weight of the evidence, and that the jury was prejudiced by irrelevant matters of a prejudicial nature brought before it by counsel for appellee in the course of the trial.

The suit in which the services were rendered was brought in equity for an accounting and injunctive relief. After hearings before the master a settlement was effected, with appellants' assent, through an outside attorney, and the cause dismissed, which, as shown by testimony improperly stricken we think, resulted in a recovery of about \$5900 for appellee after deducting all expenses of the trial. Appellants were paid \$1100 for their services, and claim \$1400 more. From a review of the evidence pointed out and abstracted we can not say that the verdict was manifestly against the weight of the evidence, which we should be able to do to justify a reversal. A review of the evidence bearing upon the value of appellants' services would require a tedious narration of details and serve no beneficial purpose.

The remaining question argued is whether it can be said that the jury was unduly prejudiced by reference in one way or another to expenses incurred by appellee in the trial. The court ruled that such matters were not relevant to the issues and instructed the jury to disregard any reference thereto. While counsel's method of attempting to bring such matters into the case after adverse rulings thereon is subject to criticism, nevertheless there was some justification for offering such evidence in the testimony of his client that

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expenses were the subject of conversation with appellant Brown in connection with attorney's fees, and in view of the instructions and the character of the evidence we do not think it apparent that the jury was so prejudiced by such procedure as to disregard the merits of the case, and we are also constrained to reach this result because of the fact this was the third trial in which the verdict was against appellants. The record does not disclose upon what grounds the retrials were granted, but we cannot assume that they were allowed because of similar prejudicial conduct on the part of appellee's counsel, as claimed in appellants' brief.

Accordingly the judgment will be affirmed.

AFFIRMED.

Merrill and Gridley, JJ., concur.

HARRY W. GREENE CONSTRUCTION
COMPANY, a corporation,
Appellee.

vs.

JOHN MONIGHAN,
Appellant.

2261.A. 645
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit brought by appellee for services and labor. A finding and judgment thereon by the court were for \$774.69, of which items for grading to the amount of \$542.75 are in dispute.

The main controversy is whether the services included in such items were rendered as extra work under the written contract, as claimed by appellant, or under a new verbal contract, as claimed by plaintiff. The court erred in taking the latter's view of the controversy.

Under the written agreement plaintiff was to provide all materials and perform all the work mentioned in the specifications for the cement floor over the entire floor area of defendant's building then in process of construction. The specifications required it to tamp solid the entire floor area and regrade with filling added as may be required. Under the agreement preliminary work was to be done in grading, tamping and making solid the ground surface. This was done by another contractor "approximately to the proper grade," as required in the specifications. Plaintiff complained that it was not brought to the proper grade, being higher in some places and lower in others, and was authorized by defendant to regrade, which, nevertheless, the specifications required him to do.

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and the items in question cover the work so performed.

In urging that this was a new contract appellee cites certain cases which have application to changes or alterations subsequently made in the plans or specifications or where the extra work constituted a new kind of work not incidental to that contracted for. We think they have no application to the undisputed facts of this case. There was no change or alteration of plans or specifications, and the work was incidental to that contracted for, if not expressly included in the terms of the specifications requiring the contractor "to thoroughly water and temp solid the entire floor area and regrade with filling added as may be required."

It is unquestionable that further regrading was necessary after the preliminary work performed by another contractor who was to bring the entire floor area, and level it off, approximately to the proper grading. Apparently his work was not entirely satisfactory, and necessitated more regrading by plaintiff than contemplated in the contract. But if so, it was work of the same kind, and incidental to that contracted for by him. Consequently we think it should be regarded as extra work done under the contract, and plaintiff seems to have taken the same view.

Article III of the agreement provided that the owner should have the right to make any alterations in the work under the contract but only on the written order of the architect, that the value of the work added should be computed by the architect, that the amount so ascertained should be added to the contract price, that if he was unable to compute the price in advance the work should proceed under his order, that he compute its value as soon as practicable, and in case of dissent from his award by either party the valuation of the

work should be referred to arbitration, as provided in Article IX of the agreement. The latter article provided that in case of a dispute as to the value of extra work either party might appeal from the architect's decision to arbitration, and provided for the manner of proceeding in such a case.

Apparently recognizing that the work of regrading was extra work under the contract plaintiff requested the architect to acknowledge in writing its arrangement with the owner for such extra work, and to make an estimate of its value. Correspondence between them ensued. In such correspondence plaintiff stated that before arbitration should be resorted to the architect should state in his judgment "what was the valuation of the so-called extra work that we have done," and as either party was entitled to arbitration only in case of dissent from the architect's award and the architect had at no time stated the value of the so-called extra work, plaintiff requested him to make his award according to the terms of Article III before arbitration could be asked for. The architect in written reply stated that in his judgment "100 hours labor equivalent to twelve and one-half work days, is sufficient time within which the work you (plaintiff) charged for additional grading can be done and I am willing to settle your bill on this basis." While the evidence discloses a dispute as to just how much regrading was necessary it is not of such a character as to disclose how much time and labor were necessary therefor, nor the price at which such services should be computed. Plaintiff submitted a bill to defendant for 506½ hours of labor at the rate of one dollar an hour, and 29 hours for the foreman at \$1.25 an hour. But conceding for the sake of argument that such an amount of time was spent in such work, yet there was no proof of an agreement to pay

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such prices or that the work was reasonably worth the price charged therefor. While upon no phase of the case do we find that plaintiff was entitled to a judgment for such an amount, and it is conceded that it is entitled to something, we can not, in the absence of adequate proof on the subject determine the amount thereof.

Neither party seems to have complied with the agreement. The architect did not compute the value, as required to do under the contract, by merely stating the number of hours of labor required for the work without stating what would be a reasonable compensation for it. We think plaintiff was entitled to a reasonable compensation for such work, and misconceived its case by failure to make proof thereof. But defendant was not entitled to a judgment on the theory that the architect had complied with the agreement by fixing the value of the work, and that the next step was one for arbitration under the contract. Accordingly we think the judgment should be reversed, and as there is not sufficient evidence from which we can fix the reasonable compensation for such work, the cause should be remanded for another trial.

HIEVERSED AND REMANDED.

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Morrill and Gridley, JJ., concur.

SAM MARSHALL,
Appellant,

vs.

M. H. STEIN,
Appellee.

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APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE CRIBLEY DELIVERED THE OPINION OF THE COURT.

In January 1931, plaintiff (appellant) brought suit in the Municipal Court of Chicago, claiming a balance of \$209.44 due on a certain trade of automobiles made on December 24, 1930. Plaintiff alleged in his amended statement of claim that on that day defendant purchased of him an used Oldsmobile car at the agreed price of \$1025; that in part payment therefor plaintiff received \$365.86 in cash and an used Ford sedan car at the agreed price of \$540; and that defendant promised to pay said balance which he failed to do. Defendant, who was a minor of 18 years of age, entered his appearance by attorney, and subsequently Ida Stein, mother of defendant, appeared as his next friend and filed an affidavit of merits and a statement of claim of set-off. In the latter defendant, by said next friend, set forth the fact of his being a minor and further alleged in substance that on December 24, 1930, at the time of said trade, plaintiff promised and agreed that should his Oldsmobile car prove unsatisfactory to defendant within 30 days after trial and use, and upon defendant returning said car to plaintiff within that time, he (plaintiff) would return to defendant said cash sum and said Ford car; that defendant, confiding in plaintiff's promise, delivered said cash sum and said Ford car to plaintiff, in exchange for

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plaintiff's Oldsmobile car; that plaintiff's car was not in the condition as represented and was tendered and returned to plaintiff within 24 hours but refused by him; and that plaintiff, not regarding his promise, has not, although often requested, returned to defendant said Ford car, of the value of \$700, or said cash sum, or any part thereof, but has refused, and still refuses, so to do. Plaintiff, in his affidavit of merits to said claim of set-off denied the minority of defendant, the value of the Ford car in excess of \$550, making any warranty to defendant as to the Oldsmobile car, or any indebtedness to defendant. The cause was tried before the court without a jury. At the conclusion of all the evidence and before the court had indicated the finding, plaintiff moved that the suit be dismissed, which motion was denied. The court found the issues against plaintiff on his statement of claim, and in favor of defendant on his claim of set-off and assessed defendant's damages at the sum of \$815.56, which is the total amount of said cash sum and the agreed value of the Ford car. After motions for a new trial and in arrest of judgment were overruled, judgment was entered against plaintiff in said sum of \$815.56, and he appealed.

After reviewing the evidence we are satisfied that on the merits of the case the finding and judgment were right and should not be disturbed.

Counsel for plaintiff make a number of technical points as grounds for a reversal of the judgment, which we have considered and seem to be without merit. The court did not err in refusing plaintiff's motion to dismiss the suit at the close of all the evidence, defendant having interposed a plea of set-off. (Practice Act, Chap. 110, sec. 48, Cahill's Stat., 1901). The defendant did not consent to the motion. No good cause was shown for such dismissal, (City of East St. Louis v. Thomas, 102 Ill. 453); and no abuse of the court's discretion in the

plaintiff's claim is not; that plaintiff's own evidence in the
condition as presented and was rendered and rendered as such
first claim is being now rendered by him; and that plaintiff's
condition is rendered, but not, although with somewhat serious

to defendant said first part of the value of 1000, or said case
now, or any part thereof, but has rendered, and will render, as
to the plaintiff, in the absence of evidence to the contrary of
not only denied the minority of defendant, but value of the first
one in excess of 1000, making any contrary to defendant, as to
the defendant's own, or any defendant's or defendant's. The same

was tried before the court without a jury, in the absence
of all the evidence and before the court had rendered the finding
plaintiff moved that the case be dismissed, which motion was
denied. The court found the issues against plaintiff on his

statement of claim, and in favor of defendant on his claim of
defendant and rendered defendant's damages at the sum of \$100.00.
which is the total amount of said sum and the other value
of the first part. The court found that a sum of \$100.00 was
of defendant's own property, defendant was rendered plaintiff's
first is said sum of \$100.00, and no damages.

There remains the question as to whether or not
to the extent of the sum of \$100.00 and plaintiff's right
and would not be disturbed.

Defendant for plaintiff seeks a number of declaratory
reliefs as grounds for a reversal of the judgment, which he does
not want and also as an affirming writ. The court did not
in reversing plaintiff's motion to dismiss the case on the basis
of all the evidence, defendant having introduced a plea of non
est. Defendant did not, and, as plaintiff's case, (1911)
the defendant did not succeed in the motion. No part of the
claim for said damages, (1911) at \$100.00, (1911) v. (1911).

matter appears. (Butler v. Cornell, 148 Ill. 276). Counsel contends that the fact that defendant, a minor, appeared by attorney is such error as warrants a reversal of the judgment. While it is true that he did so appear, his mother afterwards appeared as his next friend and filed an affidavit of merits and an affidavit of claim of set-off in his behalf. She could properly do this without any previous appointment by the court. (Chap. 64, sec. 18, Cahill's Stat. 1921). While it does not appear that she, as next friend, entered into a bond for costs, no request of her to file one was made, and such filing is not a jurisdictional requirement. (Illinois Central R. Co. v. Latimer, 128 Ill. 163; Baltimore & Ohio R. R. Co. v. Beck, 185 Ill. 400). And if there was any irregularity it was waived by plaintiff pleading to the merits of the claim of set-off. Furthermore, in our Statute of "Amendments and Joinders" (Chap. 7, sec. 6, Cahill's Stat. 1921) it is in part provided:

"Judgment shall not be arrested or stayed after verdict, nor shall any judgment upon verdict or finding by the court, * * be reversed, impaired, or in any way affected, by reason of any of the following imperfections, omissions, defects, matters or things in the process, pleadings, proceedings or records, namely: * *

Eighth. For the reason that the person in whose favor the verdict or judgment is rendered is an infant, and appeared by attorney."

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, F. J., and Merrill, J., concur.

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234 - 27191

LOUISE POPULORUM and
ESTELLE POPULORUM,
Appellees.

vs.

JULIA K. BUNDICK et al.

ON APPEAL OF JULIA K. BUNDICK,
Appellant.

226 I.A. 645

APPEAL FROM

CIRCUIT COURT,

COCK COUNTY.

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On May 26, 1921, in an action brought by complainants (appellees) against Julia K. Bundick and others to foreclose a trust deed on certain premises, the Circuit Court of Cook County entered a decree of sale, finding that there was due complainants the sum of \$11,074.46, also \$500 as reasonable solicitor's fees and certain costs, and directing that, unless the said amounts were paid within 3 days, the premises be sold, etc. On June 2, 1921, Mrs. Bundick filed her sworn petition in which, after making certain allegations, she prayed for the vacation of said decree and that complainants be required to accept from her the amount found due them in a prior decree entered by the court in said cause on March 31, 1921. No answer to said petition seems to have been filed, but on the same day an affidavit of complainants' solicitor was filed, in which he alleged that certain statements in the petition, in reference to petitioner's conversation with him on May 20, 1921, were not true in certain particulars. No certificate of evidence being contained in the present record, the above facts as to said petition and affidavit are taken from the clerk's transcript. On the same day, June 2d, the court, after a hearing participated in by counsel for the respective parties, entered an order denying the prayer of the petition, and on June 17th, on motion of the solicitors

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for Mrs. Burdick, entered the following order:

"An appeal is prayed from the decree of sale heretofore entered in this cause on May 26, 1921, and from the order of the court entered herein on June 2, 1921, denying the prayer of the petition, filed June 2, 1921, * * and said appeal is hereby allowed upon the defendant giving bond in the sum of \$5,000 within 20 days from this date, certificate of evidence in 30 days."

On June 30th, within the time allowed, Mrs. Burdick filed her appeal bond in said Circuit Court and the same was approved. From the bond it appears that her appeal was only taken from said decree of May 26, 1921. And an examination of the errors assigned by her on the transcript do not disclose that any error is assigned as to correctness of the decree. The two assignments are in substance (1) error of the court in not extending the time for her to pay the amount provided for in the decree, and (2) the failure of the court so to do under her petition of June 2nd was "an abuse of discretion."

On October 14, 1921, after the cause had been docketed in this appellate court, the complainants (appellees) filed a written motion to dismiss the appeal or to affirm the decree, supporting the motion with suggestions. Counter suggestions were filed and the motion was reserved to the hearing.

It is the rule that affidavits, read in connection with a motion to set aside a decree and copied into the record by the clerk cannot be considered by a reviewing court where not made a part of the record by a certificate of evidence. (Lang v. Meyer, 195 Ill. 420; Bellinger v. Barnes, 223 Ill. 121, 124.) As before stated there is no certificate of evidence in the present transcript.

It is also the rule that no errors will be considered by a reviewing court but such as are assigned upon the record. (Ditch v. Bennett, 116 Ill. 225, 121.) We find no assignment of

error calling in question the propriety or justice of the said decree. It is only urged that the failure of the court to extend the time for Mrs. Burdick to pay the amount of the decree was an abuse of the court's discretion. We have, however, examined the various pleadings and orders in the case, the prior decree mentioned, Mrs. Burdick's petition and the affidavits in relation to the same, as contained in the clerk's transcript, and have also read the printed briefs and arguments of respective counsel, and we are unable to see wherein the court was guilty of any abuse of discretion as contended. The decree should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Morrill, J., concur.

JOHN JUSTINICH,
Appellee.

vs.

MRS. K. M. SMITH,
Appellant.

31A. 648

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment, rendered July 12, 1921, by the Municipal Court of Chicago, that plaintiff recover from defendant, Mrs. K. M. Smith, the possession of certain premises known as Apartment 3 on the 3rd floor at No. 6442 Ellis Avenue, Chicago, and that a writ of restitution issue therefor. The cause was commenced on June 3, 1921, by the filing of a complaint in forcible detainer, and was tried before the court without a jury, resulting in the court finding defendant guilty of unlawfully withholding from plaintiff the possession of the premises and that the right to such possession was in him.

On February 26, 1920, a written lease of the premises was executed by Lela Miller, "by E. C. Russell & Co., Agts.," as lessor, and by defendant, as lessee. The premises were described therein as "Apartment 3 on the 3rd floor of building known as 6442 Ellis Avenue in said City of Chicago, to be occupied solely as a private dwelling." It was provided that the lessee was to have and to hold the premises "from the 1st day of May, 1920, until the 30th day of April, 1921, and from year to year thereafter, until this lease shall be terminated at the end of the first or of any subsequent year by either party giving to the other not less than sixty (60)

days previous notice in writing of such termination." On October 6, 1920, Lala Miller, lessor, assigned in writing on the back of the lease all of his interest in the lease and in the rents secured thereby to the plaintiff, John Justinich. On February 10, 1921, the defendant was personally served with the following written notice by an employee of the real estate firm of R. C. Russell & Co.:

"To Mrs. K. M. Smith, Lessee:

You are hereby notified that the lease, dated February 28, 1920, of the premises known and described as follows: 3rd floor, 6442 Ellis avenue, between Lala Miller assigned to John Justinich as lessor and yourself as lessee, and your interest therein as lessee, will terminate on the 30th of April 1921. This notice is given pursuant to the provision for a sixty day notice in said lease contained and shall not operate as a waiver by lessor of any other provision therein contained.

Dated this 31st day of January, 1921.

(Signed) By R. C. Russell & Co. (Signed) John Justinich,
Duly authorized Agent. Lessor."

It appears from the bill of exceptions that defendant's attorney objected to the introduction of this written notice, stating in substance (1) that it is defective in that it fails to sufficiently describe the property set out in the lease or in the complaint, merely stating "3rd floor, 6442 Ellis avenue," and not stating the city or place, and (2) that the giving of such a notice to terminate is the exercise of a power under an option given to either party by the terms of the lease, and that such power must be exercised in writing by the party, or by his agent in writing after having been duly authorized in writing by such party. The court admitted the notice in evidence.

It appears from the testimony that R. C. Russell & Co. were the authorized renting agents of the apartment building at 6442 Ellis avenue, Chicago and "handled" all notices for plaintiff, the owner; that during the month of January, 1921, plaintiff verbally notified R. C. Russell to terminate all leases;

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that the names appearing on said notice, "John Justinick, Lessor" and "W. C. Russell & Co., duly authorized agent," were signed by a young woman employee under the instructions of said W. C. Russell; that at no time did plaintiff, as lessor, give any authority in writing to any one to sign said notice; and that defendant at the time of the trial was still in possession of the premises.

The two points made by defendant's counsel on the trial are here again presented and argued as grounds for a reversal of the judgment. Under the facts disclosed and under the law we deem them to be without merit.

As to the first point, while it is true that in the notice, after the description of the premises as "3rd floor, 6442 Ellis Avenue," the word "Chicago" does not appear, yet mention is made of the lease, the date thereof, the parties thereto and defendant's interest therein as lessee. In the lease the particular agreement leased is described as being in Chicago. In Metropolitan West Side El. Ry. Co. v. Sovestis, 199 Ill. App. 451, it is decided that a notice to terminate a lease is sufficient if the lease is properly designated even though the premises are not described. We think that the notice in question, when read in connection with the lease, described the premises with such certainty that defendant could not be misled and was sufficient. (24 Cyc. 1335.)

As to the second point, counsel relies on the 2nd section of our "Frauds and Perjuries" Act (3 Jones & Add. Stat. p. 3175, sec. 5868) which reads as follows:

"No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party. * * *

This statute provides under what circumstances an agent's authority must be in writing in order to bind his principal, namely, where it is sought by action to charge the principal upon a contract for the sale of lands, tenements or hereditaments or any interest in or concerning them, for a longer term than one year. Such is not the case here. The question here is: Could plaintiff verbally authorize his agents, W. C. Russell & Co., to sign and serve on defendant a 60 days' notice of the termination of her tenancy? We think he could. In White Eagle Laundry Co. v. Slawek, 296 Ill. 340, 243, it is said: "whatever a party may do in his own proper person he may, in general, do by an agent lawfully appointed and an agent may be appointed by parol to do anything which does not require the execution of a deed for his principal. He may be authorized by parol to make and sign contracts in writing, - even contracts which are not binding upon his principal unless in writing signed by him." In Benton v. Stokes, 109 Md. 117, there was a lease under seal with the right in either party to terminate it at the end of any term "by giving at least 60 days previous notice thereof in writing." As here, such written notice of termination was given by the landlord's agent in writing, under his verbal and not his written authority, and the notice was held sufficient.

For the reasons indicated the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, F. J., and Morrill, J., concur.

252 - 27210

ALBERT H. SPONLIDEN, Appellee.

vs.

JOSEPH ARNSEN, Appellant.

2261A 646
APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On March 30, 1921, plaintiff, the indorsee and holder of a promissory note, caused a judgment by confession to be entered on it in the Municipal Court of Chicago against the defendant, the maker, for \$1025.30. The note is dated January 27, 1921, and by its terms the defendant, signing his name as "Joe Arnsen," promised to pay to the order of Robert A. Pottinger, 60 days after date, the sum of \$1000, for value received, with interest at 7% per annum after maturity. Above defendant's signature was a clause authorizing any attorney of any court of record to appear for defendant, at any time after maturity, and confess judgment for such amount as might appear unpaid thereon, together with costs and \$25 attorney's fees. On the back of the note appears the signature of the payee, Robert A. Pottinger, and above this signature are some printed words of guaranty, but no words limiting or qualifying the effect of that signature as an indorsement. Subsequently, the judgment was opened and defendant given leave to file an affidavit of defense, the judgment in the meantime to stand as security. On July 25, 1921, the cause was tried before the court without a jury, resulting in the court finding that at the date of the rendition of the judgment by confession there was due from the defendant to the plaintiff the said sum of

25th May 1944

Dear Sir,

I am sorry to hear

that you are

unwell.

Yours faithfully,

W. H. D.

W. H. D.

I am sorry to hear that you are unwell.

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§1025.38, and entering judgment that said judgment by confession stand confirmed as of the date of its rendition. Defendant appealed.

On the trial plaintiff offered the note in evidence and rested. The defendant did not dispute the facts that defendant had signed the note as maker and had delivered it to the payee, Pottinger; that Pottinger's signature was on the back of the note; or that at the time judgment was confessed plaintiff was the holder of the note for value.

The defense in substance was, and the point is here again urged, that the printed words above the payee's signature on the back of the note negatived the effect of that signature as an indorsement to pass title upon delivery to the plaintiff. There is no merit in the point. In sections 30 and 31 of the Negotiable Instruments Act of this state, in force July 1, 1907 (Cahill's Stat. 1921, Chap. 98, secs. 50 and 51) it is provided:

"An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof; if payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery."

"The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement and the addition of words of assignment or of guaranty shall not negative the additional effect of the signature as an indorsement unless otherwise expressly stated."

The judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Merrill, J., concur.

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On the basis of the information received from the source, it was determined that the information was reliable and that the source was a person of good character and high integrity. The information was obtained from the source in a confidential manner and is being furnished to you for your information only. It is not to be disseminated outside your office without the express approval of the source.

The source is a person of good character and high integrity and is being furnished to you for your information only. It is not to be disseminated outside your office without the express approval of the source. The information was obtained from the source in a confidential manner and is being furnished to you for your information only. It is not to be disseminated outside your office without the express approval of the source.

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CONFIDENTIAL

273 - 27231

HELEN PSIMOUIS,
Appellee,

vs.

TOM SARANTOPOULOS, E. FRANK,
GUST SARANTOPOULOS, CARRY
WALSH and MORRIS ROSE, doing
business as E. FRANK & CO.,
Appellants.

226 I.A. 646

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE ORRILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment rendered against them on April 28, 1931, by the Municipal Court of Chicago, upon a directed verdict in favor of plaintiff in a forcible detainer action wherein plaintiff sought to recover the possession of certain premises in Chicago described in the complaint as the "store, basement and second floor of premises located at 910 West Randolph street." The verdict, as directed after a trial upon the merits, was that defendants were guilty of unlawfully withholding the possession of the premises from plaintiff and that the right to the possession thereof was in her, and the judgment which followed was in the usual form.

On January 1, 1930, plaintiff by written instrument leased the premises to Tom Sarantopoulos from that date to April 30, 1932, at a monthly rental of \$200 for the first four months of the term and thereafter at \$225 per month, to be occupied for a "commission business, wine and fruit." The lessee took possession at the commencement of the term. In the fourth clause of the lease he covenanted that he would not sub-let the premises, or any part thereof, or assign the lease without the written consent of the lessor being first had. Plaintiff claimed on the trial that the lessee violated

040 A.T. 259

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LEADERS OF THE ORGANIZATION ARE NOT
THOSE WHO ARE CURRENTLY IN THE
ORGANIZATION. THE ORGANIZATION IS
A GROUP OF PEOPLE WHO ARE CURRENTLY
IN THE ORGANIZATION.

this covenant by assigning the lease to other parties without her written consent. The evidence disclosed that about March 1, 1921, Tom Sarantopoulos turned over the lease to his brother, Gust. Sarantopoulos, and to W. Frank, Carry Walsh and Morris Rose, doing business as W. Frank & Co., and that they then went into possession of, and thereafter conducted a business in, the premises. On March 8th, plaintiff caused a written notice, addressed to Tom Sarantopoulos at 916 W. Randolph street, Chicago, to be served by her husband, George Psimoulis, upon Carry Walsh personally, who was then in the premises and apparently in charge thereof. In this notice attention was directed to said fourth clause of the lease and to the fact that said lessee had breached that covenant, and above plaintiff's signature to the notice it was stated that she had "elected to determine your lease, and you are notified to quit and deliver up possession," etc. to her "within ten days of this date." The notice on its face was dated "this 7th day of March, A. D. 1921." On March 23rd plaintiff caused a written notice to be served by her said husband upon Gust Sarantopoulos, W. Frank, Carry Walsh and Morris Rose, personally, in which she demanded the immediate possession of the premises (describing them), and on March 26th she commenced the present action.

It further appears from the evidence that on March 3rd the defendants, other than Tom Sarantopoulos, caused a check for \$225, signed by Carry Walsh and Gust Sarantopoulos and drawn on a bank in which they had funds, to be sent in a registered letter addressed to plaintiff, in payment of the rent of the premises for the month of March, 1921, which check, though never cashed by plaintiff, has not been received back by said defendants, and that George Psimoulis,

husband of plaintiff, at all times acted as her agent in drafting leases, collecting the monthly rents and managing the property. According to the testimony of Carry Walsh and other of defendants' witnesses George Psimoulis visited the premises on March 4th, saw the sign "H. Frank & Co.", inquired what it meant and also stated that his wife had received said check of \$225 by registered letter; that he was informed that said defendants, other than Tom Sarantopoulos, had taken over the latter's lease, and that thereupon Psimoulis stated that he had no objection to them as tenants, as it made no difference to him whether they or Tom paid the rent as long as he received it by the 5th of each month; that Psimoulis thereafter saw one or more of said defendants every day until March 23rd, when he served said demand notice upon them; and that said notice was the first intimation they had received that the possession of the premises by them was not acceptable to plaintiff.

Psimoulis denied making the statement on March 4th, or at any other time, to the effect, as testified by defendants, that he consented to the transfer of the lease to defendants and their being in possession and paying the rent in the future.

It is contended by counsel for defendants that the judgment should be reversed because the lessee, Tom Sarantopoulos, was not given 10 days previous notice of the termination of the tenancy, as required by section 9 of the Landlord and Tenant Act. The argument is, as we understand it, that said notice was dated on "March 7th" and said lessee was notified to quit and deliver up possession "within ten days from this date," that the notice was not actually served until March 8th, and therefore only nine days notice was actually given. There is no merit in the contention. The lessee was given more than ten days notice; the action was not commenced until March 26th.

It is further contended that under the conflicting evidence, as to whether the clause in the lease against any assignment without the lessor's written consent had been waived, the trial court erred in directing a verdict for the plaintiff at the close of all the evidence. We are of the opinion, after a consideration of the evidence, that the cause should have been passed upon by a jury under appropriate instructions and that the court was not warranted in directing the jury to return a verdict in favor of plaintiff. It is the law of this state that a clause in a lease that the same shall not be assigned without the written consent of the lessor is for the benefit of the lessor only, that such an assignment otherwise made is not absolutely void, but voidable only at the option of the lessor or his representative, and may be waived; and that any act done by the landlord, or by his duly authorized agent, knowing of such cause or forfeiture by the tenant, affirming the existence of the lease and recognizing such assignee as his tenant, is a waiver of such forfeiture. (Webster v. Nichols, 104 Ill. 160; Krygeman v. Stamatakis, 175 Ill. App. 583, 586.)

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Merrill, J., concur.

It is the duty of the State to protect the rights of its citizens.

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300 - 27298

SUTTON MFG. CO.,
a corporation, Appellee,

vs.

BELTINE CHEMICAL AND
MANUFACTURING CO.,
a corporation, Appellant.

225 I.A. 648

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GREDLEY DELIVERED THE OPINION OF THE COURT.

On August 10, 1921, in the above entitled cause, an order was entered in the Municipal Court of Chicago striking from the files on the ground of its insufficiency defendant's amended affidavit of merits to plaintiff's statement of claim, and entering judgment against defendant by default for want of an affidavit of merits or defense in the sum of \$1,128.10, the amount claimed by plaintiff. The sole question involved in this appeal is whether said affidavit states such a good and sufficient defense to plaintiff's claim as warrants a trial on the merits. Plaintiff has not appeared and filed any brief and argument in this appellate court.

The action, which is one of the first class in contract, was commenced on May 25, 1921. From plaintiff's statement it appears that its claim is for balance due on account of certain merchandise or chemical compounds, called "Sut-Net," sold and delivered to defendant at its request on the dates specified in Exhibit A, attached to plaintiff's statement and made a part thereof, amounting to \$1054.40, and accrued interest from December 15, 1919. Said Exhibit A discloses various deliveries of the merchandise from October

11, 1918, to December 18, 1918 to defendant and various payments made by defendant and the balance, to which is added the sum of \$73.50 for interest. Accompanying the statement of claim is the affidavit of plaintiff's agent that the total sum due and unpaid is \$1128.10.

Defendant entered its appearance and demanded a jury trial, and, on June 16, 1921, filed its affidavit of merits by its president, Walter K. Marie, which affidavit was by order of court stricken from the files on July 18th, and defendant given leave to file an amended affidavit of merits, which it subsequently did by its president.

In the amended affidavit of merits defendant admits the purchase of the "Aut-Net" at the various dates mentioned, but avers that plaintiff's statement of claim does not ~~show~~ show returns of certain of the merchandise to plaintiff for which defendant should have received credit. It is then averred in substance that on or about October 1, 1918, defendant entered into a contract with plaintiff to act as the exclusive sales agent and distributor of "Aut-Net" throughout the United States for 50 years, under the terms of which defendant undertook to advertise and develop sales at its expense, while plaintiff on its part agreed to deliver said merchandise of uniform grade and quality to fill orders obtained by defendant; that defendant expended large sums in advertising, hiring salesmen, etc., in the promotion of sales, and as a result thereof and by its efforts a national distribution was effected and orders obtained within three months to an amount exceeding \$25,000; that by the substitution of inferior materials plaintiff delivered a large supply of the merchandise of inferior quality and defendant received complaints, and many "repeat orders" were cancelled by its customers and many shipments refused because the quality of the merchandise was not

of the same grade as that first furnished; that plaintiff finally admitted that it had made substitution of inferior materials and replaced a portion of the merchandise as returned; that by reason of such substitutions and replacements defendant's expenses were increased by re-packing, loss of packages, labels, etc. and 2500 boxes of the merchandise were returned by purchasers upon which defendant suffered damages to the extent of \$815, of which \$360 was in the merchandise, \$150 in loss on boxes, labels, labor, etc., \$225 in commissions and \$80 in freight and cartage; that defendant also lost profits in an unliquidated amount on sales developed through the expenditure of \$4864 for advertising and salesmen's salaries, \$2767; that differences of opinion as to the running of the business and as to defendant's claims resulting from said substitution of inferior materials arose and remained unsettled on June 15, 1930; that on that date plaintiff claimed an indebtedness to it from defendant of approximately \$1000 and demanded payment thereof, while defendant claimed an indebtedness from plaintiff in excess of said sum, for the reasons above stated; that defendant surrendered its said contract with plaintiff in adjustment of all claims and settlement of all controversies arising between the parties on account of the facts as above set forth, and on June 28, 1930, the parties entered into a written agreement of the mutual release and discharge of all contracts between them and "obligations thereunder;" (this agreement is set forth in full) and that by reason of the foregoing defendant is not indebted to plaintiff in any sum.

We are of the opinion that defendant's amended affidavit of merits should not have been stricken from the files, or the judgment entered without a hearing on the merits. The affidavit states a good defense by way of recoupment to the extent of at least \$815. It also states

that the contract made between the parties on or about October 1, 1918, and under which the controversies arose as outlined, was surrendered by defendant, and that the parties entered into a written agreement of mutual release and discharge of all contracts between them and "obligations thereunder." Whether said written release, of itself, can be construed as a release of the claim sued on, under the facts alleged, is questionable, yet such evidently is defendant's view and the release is pleaded and notice given of that defense, and such facts may be disclosed upon the trial as to warrant the court in admitting extrinsic evidence to show the surrounding circumstances and the nature of the transactions to which it was intended to apply. (34 Cyc. 1076; Miller v. Lloyd, 191 Ill. App. 230.) However this may be, defendant should be allowed the opportunity of proving, if it can, its right of recoupment as alleged.

The judgment of the Municipal Court is reversed and the cause remanded for a trial upon the merits.

REVERSED AND REMANDED.

Barnes, P. J., and Morrill, J., concur.

367 - 27325

THE PUBLISHERS PRESS,
a corporation,
Appellee,

vs.

MACRAE PUBLISHING COMPANY,
a corporation,
Appellant.

226 I.A. 646

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GRIBBLEY DELIVERED THE OPINION OF THE COURT.

Defendant by this appeal seeks to reverse a judgment for \$90 rendered against it by the Municipal Court of Chicago on March 15, 1921, after a trial before the court without a jury, resulting in the court finding the issues against defendant and assessing plaintiff's damages at said sum.

The action was commenced on March 7, 1921, by the filing of a statement of claim, accompanied by an affidavit of claim sworn to by plaintiff's agent. In the statement it is alleged that defendant is indebted to plaintiff in the sum of \$90 for composition work done and furnished by plaintiff to defendant at its request, and that said amount is the usual and customary charges for the work at the time when done. The transcript of the record discloses that a summons was issued on March 7th returnable before said court at 9.30 a.m. on March 15th following; that according to the return of the bailiff on the back of the writ the defendant was served on March 8th by delivering a copy of the writ, statement of claim and affidavit attached, to Leola Lillard, agent of defendant corporation, in the City of Chicago, and at the same time informing her of the contents of the papers, and that the president, etc., or any other agent, of defendant was not found in said city; that the parties appeared on March 15th; and that

on that day the cause came on for trial in regular course without a jury, and evidence was heard, and the finding and judgment as above mentioned was entered. What transpired on the trial is not disclosed by the bill of exceptions. It does not appear that defendant, before a trial on the merits was had, in any manner questioned the validity of the service on it or the jurisdiction of the court to try the cause. The bill of exceptions only discloses that on March 29th the respective parties appeared by attorneys, that defendant moved to vacate the judgment, supporting its motion by written suggestions, and that the court denied the motion. This appeal followed. The suggestions were not supported by any affidavit as to the truth of any of the facts therein alleged. They were to the effect that Leola Lillard, to whom the writ and other papers were delivered, was not an agent of defendant but only a stenographer; that the statement of claim did not sufficiently state a cause of action; and that the affidavit thereto was defective in that the affiant failed to allege that he had knowledge of the facts stated in the statement of claim, as required by Rule 16 of the Municipal Court. Inasmuch as the record discloses that the case is one of the fourth class and that both parties appeared and that a trial was had on the merits, all these defects, if any there were, were cured by such appearance and trial or by the finding and judgment. (Mix v. People, 106 Ill. 425, 428; Clinton Co. v. Stiles, 197 Ill. App. 506; Hunt v. Keating, 301 Ill. App. 987.) There is no merit in the appeal and the judgment is affirmed.

AFFIRMED.

Barnes, F. J., and Merrill, J., concur.

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and made of hospitalised adult female patients only and aged 18-65 years.

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FOREMAN BROS. BANKING CO.,
Administrator of the estate
of Edith E. Jones, deceased,

Appellee,

vs.

THOMAS J. McINERNEY and
JAMES P. McINERNEY, doing
business as McInerney Bros.
and McInerney Bros. Auto
Livery Company, a corporation,

Appellants.

22611, 647

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Appellants, who were defendants in the court below, have appealed from a judgment of the Circuit Court of Cook County awarding damages to the amount of \$7500 to plaintiff for personal injuries sustained by its intestate, causing her death, as the result of an accident alleged to have been due to the negligence of defendants' employee in operating an automobile belonging to them.

The accident occurred at the intersection of Thirty-fifth and State streets, Chicago, at about 9 P. M., September 10, 1918. Both of these streets are busy thoroughfares, having double street car tracks on them. Plaintiff's intestate, who was about seven years old, while crossing from the west to the east side of State street on the north crosswalk of Thirty-fifth street, was struck by defendants' automobile just before she reached the east curb of State street. The injuries received resulted in her death two days later. In crossing the street she had passed in front of a southbound street car on State street, which had stopped at the street intersection, thereby permitting her passage in safety over the west half of the street. Defendants' automobile was

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traveling north on the east side of State street. Several witnesses testified that its speed was about twenty miles an hour, which was not slackened as it approached the street intersection. The automobile came into the view of the two companions of the intestate when it was about forty or fifty feet south of Thirty-fifth street after it had passed a northbound car on State street. It passed this car on the right hand side. Just prior to that time the car to some extent prevented persons standing in the middle of the street intersection from seeing the automobile.

Counsel for appellants do not contend that the driver of the car was free from negligence, but seek a reversal upon the ground that the negligent conduct of plaintiff's intestate contributed to the accident. This was a question for the jury to decide, and the verdict was not contrary to the manifest weight of the evidence. Stack v. East St. Louis & Suburban Ry. Co., 245 Ill. 308; Fenner v. Stanatoken, 183 Ill. App. 147. The jury was justified in believing that defendants' driver should have observed plaintiff's intestate on the crosswalk and that the proximate cause of the accident was the negligence of the driver. The accident could have been avoided by the exercise of ordinary care on his part.

It is also urged that the court committed reversible error in not striking out a statement of one of plaintiff's witnesses to the effect that the driver just after the accident said, in substance, that he was in a hurry at the time of the accident. Such a declaration may fairly be regarded as part of the res gestae. Quincy N. M. & C. Co. v. Gmug, 137 Ill. 264; Maren C. & I. Co. v. Howell, 217 Id. 190. We find no reversible error in this or other rulings of the trial court upon questions of evidence.

It is also claimed by appellants that the damages were so excessive as to indicate that the jury was influenced by sympathy, passion or prejudice. It has been held repeatedly that in case of a death of a person of tender years and unformed habits, the question of damages is left entirely to the discretion of the jury and that no verdict in such a case within the statutory limits can be held excessive by a reviewing court. Chicago City Ry. Co. v. Reddick, 139 Ill. App. 160; Same v. Strong, 139 id. 511; Owan v. Boston Store, 191 id. 64. These and many other decisions of similar import prevent a reversal in this case on account of excessive damages, there being no claim that the jurors were influenced by improper instructions or by inflammatory appeals to their sympathies, passions or prejudices.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

445 - 27403

BLACKSTONE SHOP, a Corporation,
Appellee,

vs.

BLUM'S, INC., a Corporation,
and HARRY H. BLUM,
Appellants.

226 I.A. 647

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit court of Cook County entered July 15, 1921, approving the report of the master in chancery to whom the case had been referred and granting a permanent injunction restraining defendants, who are appellants here, from interfering with the installation upon the premises at 628-630 South Michigan avenue of the appliances, consisting of wires, conduits, switches and meters necessary to enable complainant to obtain electric current from the Commonwealth Edison Company. This injunction was substantially the only relief prayed by the bill.

The record shows that for some eight years prior to the filing of the bill complainant had been in the possession, under leases from the former owner, of a considerable portion of the first and second floors and basement of the building known as No. 626-630 South Michigan avenue. These leases were for terms expiring April 30, 1922. During the summer of 1919 defendant Blum's, Inc., purchased the building and on May 30, 1919, executed a lease to complainant for the part of the building then occupied by complainant and some additional space on the second floor for a term of ten years beginning May 1, 1922. Both complainant and defendant Blum's, Inc., are engaged in the business of selling ladies' wearing apparel at retail. Defendant Blum owns a controlling interest in Blum's, Inc., and also owns the Vogue Shop, which is engaged in

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It is the policy of the FBI to keep all information received from confidential informants confidential. This policy is based on the fact that the disclosure of the identity of confidential informants would be likely to result in the identification of other confidential informants and the disclosure of the identity of confidential informants would be likely to result in the identification of other confidential informants. This policy is based on the fact that the disclosure of the identity of confidential informants would be likely to result in the identification of other confidential informants. This policy is based on the fact that the disclosure of the identity of confidential informants would be likely to result in the identification of other confidential informants.

The FBI is a federal law enforcement agency. It is the policy of the FBI to keep all information received from confidential informants confidential. This policy is based on the fact that the disclosure of the identity of confidential informants would be likely to result in the identification of other confidential informants and the disclosure of the identity of confidential informants would be likely to result in the identification of other confidential informants. This policy is based on the fact that the disclosure of the identity of confidential informants would be likely to result in the identification of other confidential informants. This policy is based on the fact that the disclosure of the identity of confidential informants would be likely to result in the identification of other confidential informants.

the same line of business. Blum's, Inc., and the Vogue Shop are located in the Congress Hotel building, which is about one block distant from the building in question. All three of these concerns are business competitors.

The premises occupied by complainant were equipped with electric light fixtures, and until October, 1930, the electric current required by complainant was furnished by the Commonwealth Edison Company, a public service corporation, by means of wires and conduits located in parts of the basement used jointly by the tenants of the building and through a meter located on the north wall of the basement. Complainant paid the Commonwealth Edison Company for its electric current from time to time as bills were rendered. This arrangement had existed continuously during complainant's occupancy of the premises with the full knowledge and approval of defendants.

In May, 1930, defendants established in the building work rooms and offices for their business which was conducted in the Congress Hotel building in competition with complainant and used for that purpose 25,000 square feet of space, which could have been lighted by electricity furnished by the Commonwealth Edison Company in the same manner as such current was supplied to other occupants of the building. Instead of adopting this plan defendant Blum's, Inc., decided to remove the various switches and meters used by the other tenants, including complainant, and to install similar appliances upon its own premises with a view to selling at retail to its tenants the electric current obtained from the Commonwealth Edison Company upon a wholesale basis. This plan was made known to complainant by a letter from Blum's, Inc., dated June 1, 1930, which notified complainant that the proposed arrangement had been completed with the Commonwealth Edison Company. Complainant replied to this letter and stated explicitly that complainant was

not interested in the proposition and did not wish to contract with said defendant for electric light service and expressly directing that the meter and wiring used by complainant be allowed to remain intact and that none of complainant's wiring be attached to defendant's meter. Thereafter, in the fall of 1930, defendants, without the knowledge or consent of complainant and regardless of the latter's objection to the plan, removed complainant's meter and switch and cut the wiring and conduits used by complainant so that it could no longer receive electric current direct from the Commonwealth Edison Company. As a result of this arrangement the lighting rates paid by complainant were increased somewhat and Blum's, Inc., was placed in absolute control of the switches and meters through which electric light was furnished to complainant. Complainant in a letter dated November 17, 1930, protested against this arrangement, requested that the former system of wiring and lighting be restored and stated that complainant had no intention of purchasing electric current from said defendant. There was some further correspondence upon the subject which it is unnecessary to state in detail.

The leases to complainant contained a provision to the effect that the lessor may enter the leased premises at all times "for the purpose of making such repairs and alterations therein as the lessor may deem necessary for the safety, preservation or improvement of said premises or said building or appurtenances thereof." On the back of the lease certain rules and regulations were printed, which, by the terms of the instrument, were made a part thereof. The particular rule which is alleged to be applicable to the present situation provides that the tenant shall not, without the lessor's written consent, use anything except electricity for power and electricity or gas for illuminating purposes, "and that only from such company or companies as lessor may have contracted

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with to furnish such service." Defendants rely upon these provisions to justify their action. They urge in support of their contention that in construing words and phrases contained in an instrument, effect must be given to their plain and ordinary meaning, but fail to show that this well established proposition has been violated in any respect by the decree involved herein. Defendants also cite the familiar maxim that "He who seeks equity must do equity," and argue that it would be inequitable to compel defendants to incur the expense of restoring the former electric wiring system without any benefit being derived therefrom by complainant. The record does not disclose any inequitable conduct on the part of complainant, so that the maxim has no application to the present case. It can not be assumed that the restoration of the electric wiring, conduits, switches and meter would be without benefit to complainant, in view of the fact shown by the record that complainant's expenses for electric lighting have been increased under defendant's plan. Complainant is justified in objecting to a plan under which an active business competitor is given practical control of its electric light and power, it appearing from the record that the switchboard controlling the electric current used by complainant is located in a part of the building to which complainant has no access and over which it can exercise no authority whatever.

Both the master's report and the decree found that complainant is entitled to enjoy the premises devised to it during the term of the leases as the premises were when complainant took possession thereof, including the means and method of obtaining electric current as they existed at that time, and that complainant was entitled to purchase its electric current from the Commonwealth Edison Company, there being nothing to the contrary expressed in said leases, which constituted the only contract between the parties.

The changes made by defendants in the electric lighting arrangements of the premises occupied by complainant cannot be considered either as a repair or an alteration for the safety, preservation or improvement thereof. It was also found by the Decree that defendant Elum's, Inc., had no charter power to sell electricity, having been incorporated for the sole purpose of "merchandising in ladies' apparel," which did not give it the right to deal in electricity. This finding is immaterial, for the reason that there is no contract between complainant and defendant Elum's, Inc., providing for the furnishing of electric current by said defendant to complainant. It is therefore unnecessary to discuss the validity of such a contract.

The decree of the Circuit court is fully sustained by the law and the evidence and is therefore affirmed.

AFFIRMED.

Barnes, F. J., and Gridley, J., concur.

472 - 27430

HARRY G. COWEN,
Appellee,

vs.

HENRY CLAY,
Appellant.

226 I.A. 647
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Appellee, who was plaintiff below, recovered a judgment in the Municipal court of Chicago for \$195 against defendant, who operated a hotel and rooming house containing fifty-two rooms at 150 Eugene street, Chicago. The claim was for the value of certain wearing apparel alleged to have been stolen June 30, 1931, from a room rented by plaintiff from defendant.

Plaintiff rented the room in question May 18, 1931, paying \$7 a week therefor. At that time he was assured by the landlord that there was no occasion to fear any loss by robbery and that the landlord and his wife operated the place and everything would be all right. Plaintiff occupied the room until June 30, 1931. On that date he found upon returning to his room that it had been thoroughly ransacked and his clothing stolen. He reported the fact to the landlord, who stated, in substance, that he and his wife had been absent during the entire afternoon, leaving employees in charge of the hotel, and that a number of thefts had been committed. He stated that a colored man and his wife in the employ of the landlord were guilty of these acts. Plaintiff's testimony as to these admissions of the landlord was corroborated by another witness.

The liability of defendant is denied upon the ground that plaintiff was a roomer and defendant a lodging house keeper and that the relation between them was not that of a guest and an innkeeper; that a lodging house keeper is under no duty to care for

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the property of a roomer left in the room during his absence, citing Clifford v. Stafford, 146 Ill. App. 347; Vigano v. Nelson, 140 Ill. 644; Gray v. Bristol Arms Hotel, 146 Ill. 424. The contention that plaintiff was a mere roomer is based upon the fact that he had contracted for an indefinite stay at a fixed price per week, thereby establishing his status as that of a roomer instead of a guest. The cases cited by appellant sustain the proposition for which he contends, but later decisions have established a different rule. The law applicable to such a case was fully discussed in Gross v. Harbison European Hotel & R. Co., 176 Ill. App. 160, and the rule as established in Clifford v. Stafford, supra, was repudiated, the court holding that a weekly rate and a lengthy stay at a hotel does not take away from a person the status of a hotel guest, citing Hancock v. Hand, 94 N. Y. 2, and Moyn v. Yarian, 147 Ill. App. 323.

Plaintiff had no contract with his landlord indicating a permanent residence at the hotel. He had not become a boarder and lost his standing as a guest. He was not prevented by any contract obligation from departing at his pleasure and taking up his residence elsewhere. Defendant was clearly negligent in leaving the establishment under the charge of irresponsible help, with whom he had but slight acquaintance. He did not exercise the ordinary care required for the protection of plaintiff's property. The judgment of the Municipal court is not contrary to the manifest weight of the evidence or against the law applicable to the case.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

27867

INTERNATIONAL LAMP MANUFACTURING
COMPANY, a corporation,

Appellee.

vs.

JULIUS E. LEVIN,

Appellant.

226 I.A. 647

INTERLOCUTORY

APPEAL FROM

SUPERIOR COURT.

COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order of the Superior Court of Cook County entered May 16, 1928, overruling the motion of defendant, who is appellant here, to dissolve a preliminary injunction granted May 8, 1928, upon the bill of complaint which had been filed on the preceding day.

The bill prays for an accounting between the parties as to their transactions under a certain contract between them dated February 25, 1921, which constituted the basis of the controversy and for other relief incidental thereto. This contract, in substance, provided that complainant should assign to defendant certain of its accounts from reputable debtors for which defendant agreed to pay a sum equal to eighty per cent of the face amount thereof but not exceeding \$150,000, and that the complainant shall act as defendant's agent in collecting the accounts, transferring all remittances to defendant in their original form. Complainant guaranteed the payment of the accounts at maturity, and in case of failure of the debtor to pay the full amount, that it would pay such amount to defendant, who would thereupon reassign the account to complainant. The contract further provided that defendant should be entitled to compensation for certain

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services to be performed by him therein specified. The provisions defining these services required defendant to place his collection department at the disposal of complainant, to have his auditors examine complainant's books and accounts every sixty days and report the result of such examination with instructions to complainant as to the best method of keeping books, records and accounts; that defendant should pay the expense of such audits, place his credit department at the disposal of complainant, paying for all credit investigations of accounts purchased or offered for purchase under the contract; that complainant should have the right to consult defendant's counsel for advice and legal opinions as to any of its contracts; that defendant should obtain and have on hand sufficient funds to make prompt payment to complainant for all approved accounts and supply all forms and stationery proper for the sale and assignment of accounts under the contract. The contract then provided that for these services defendant should be paid a sum equivalent to five per cent of the face amount of accounts assigned for the period of sixty days or any fraction thereof, and thereafter a sum equivalent to two and one-half per cent for each thirty days or fraction thereof that said accounts remained unpaid; that defendant should have the right to examine the books and records of complainant relating to its accounts and that when defendant had been repaid the amount of its advances and the amounts due it for services as specified in the contract, and all disbursements made or liabilities incurred for exchange or for attorney's fees or other expenses, he shall reassign to complainant all accounts then uncollected.

It will not be necessary to set forth the allegations of the bill of complaint in great detail, as the merits of the case are not before us under the present appeal. The bill

alleged in substance the making of the contract above mentioned, setting forth the terms thereof, and charged that the amounts advanced by defendant to complainant constituted loans secured by the accounts assigned, but that in order to conceal the fact that these loans were made in pursuance of an unlawful, corrupt and usurious agreement, it was provided in the agreement that defendant was to receive compensation for pretended services, as above stated, to be rendered by him, while as a matter of fact all of the alleged services were merely for the purpose of giving defendant a full control over the collection of the accounts assigned by complainant, and that no such services were in fact rendered to complainant or were ever intended to be so rendered; that all of the forms supplied or intended to be supplied to complainant by defendant were the forms necessarily used in the assignment of the accounts in question. The bill further alleged numerous transactions between the parties between February 25, 1921, and March 31, 1922, whereby defendant had loaned to plaintiff an aggregate amount of \$373,110.44, and that complainant had paid to defendant in return for said loan the sum of \$380,470.29, which was largely in excess of the amounts loaned and lawful interest thereon; that defendant had done nothing under said agreement except to make loans to complainant to the amount of eighty per cent of the face value of the accounts which had been assigned to defendant as security therefor; that said agreement had always been treated by the parties as an agreement for loans of money; that defendant now holds assignments of numerous accounts, approximately one hundred in number, amounting to an aggregate of \$57,827, and that defendant had never rendered any statement to complainant and no final settlement of the transactions between the parties had ever been made; that complainant had paid to defendant over and above what was justly due to defendant on

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account of said loans and the interest thereon, the sum of \$12,432.48; that defendant now claims that he is entitled to receive from complainant under said contract over \$35,000 on account of interest on the money so loaned and has informed complainant that if said amount is not paid, defendant will notify the persons named in said accounts of the fact of the assignment to defendant of the respective accounts, and it is charged that defendant will so notify said persons unless restrained by an order of court; that the persons owing said accounts are widely scattered throughout the country; that if notice is served upon them by defendant to the effect that said accounts have been assigned, the said persons will refuse to pay the accounts and great uncertainty will arise in their minds as to whom the same should be paid, resulting in a large number of suits, great expense in litigation and uncertainty of collection; that many of such accounts, because of the delay that will necessarily result from the service of such notice, may become difficult or impossible to collect and that the good will of the business established by complainant will be destroyed if notice of such assignments is given, all of which will result in great and irreparable loss and damage; that defendant claims to own said accounts by reason of said assignments and claims to have the right to sell the same and to make any and all kinds of settlements and adjustments which he may desire with any of the parties owing the accounts and charges that unless defendant is restrained from so doing, he will sell, dispose, assign or compromise said accounts to complainant's damage. The prayer of the bill is in the usual form for an accounting between the parties and for a cancellation of the agreement, the reassignment of the accounts to complainant and that an injunction be granted restraining defendant from

notifying the persons named in said accounts of the assignments thereof and from interfering in any way with the collection by complainant of said accounts and for general relief. The bill was verified by the affidavit of the president of complainant corporation, which is in conformity with the requirements of the statute relating to preliminary injunctions granted without notice.

The injunction order of May 2, 1922, restrained defendant in accordance with the prayer of the bill, from notifying the persons named in the accounts assigned by complainant to defendant of the fact of said assignment and from interfering in any way with the collection of said accounts for a period of fifteen days from date, and required an injunction bond of \$7500 for the protection of defendant. On May 6, 1922, defendant filed its answer, admitting many of the material allegations of the bill but denying that the transactions contemplated by the agreement of February 25, 1921, were loans and alleging that the contract was a service contract under which complainant agreed to pay, as therein specified, for services to be rendered to it by defendant, and denied those allegations of the bill of complaint which were based upon complainant's construction of the contract. The answer further admitted numerous transactions between the parties and that there had been no general settlement, although alleging that the assignment of each account was a separate transaction which had been fully settled upon the payment of the particular account and that it had rendered repeated statements to complainant. The answer further stated that in the absence of a detailed audit, it would be impossible for defendant to show the precise amount of money paid to him by complainant for accounts receivable assigned under the terms of the agreement, and that no general settlement or determination or statement of the account between the parties could be made without

relating the various names in said account of the assignment
thereof and the interest in any way with the assignment to
completion of said account and for general relief. The bill
was verified by the affidavit of the president of complainant
organization, which is in conformity with the requirements of the
statute relating to preliminary injunctions granted without

notice.

The injunction order of May 2, 1901, mentioned
herebefore is contained in the report of the court at New York
and the petition filed in the circuit court of the district
of Columbia at the time of said assignment and then returned.

In any way with the assignment of said account for a period of
thirteen days from date, and returned an injunction order of return
for the protection of defendant. On May 2, 1901, defendant filed
his answer, admitting many of the material allegations of the

bill but denying that the transactions contemplated by the answer
were of February 22, 1901, were loans and alleging that the same

transacted was a service contract under which complainant agreed to
pay, on certain installments, the services to be rendered to it by
defendant, and denied those allegations of the bill of complaint
which were based upon complainant's confession of the return.

The answer further alleged various transactions between the
parties and that there had been no general assignment, although

admitted that the assignment of each account was a separate
transaction with the party with which each account was opened at
the particular account and that it had requested separate copies

thereof in compliance. The answer further stated that in the
absence of a settled audit, it would be impossible for defendant
to show the precise amount of money paid to him by complainant
for accounts previously assigned when the books of the latter
showed that no general assignment or contribution or other

such audit.

Thereafter, on May 16, 1922, defendant moved to dissolve the injunction, relying upon the allegations of its answer to support said motion. This motion was overruled by the court, and it was ordered that the injunction continue in full force and effect to and including May 17, 1923. The present appeal is from the order of May 16, 1922.

Appellant contends that the injunction should be dissolved because appellee, which is an Illinois corporation, is precluded by the general corporation act of 1910 from setting up the claim of usury; that the order denying the motion to dissolve was erroneous because the court had nothing before it except the bill and the sworn answer wherein all of the allegations of the bill were denied; that the original bill of complaint was not properly verified and did not warrant a preliminary injunction; that substantially the identical contract between the parties herein has been sustained by the Supreme Court of the United States in the case of Houghton v. Burden, 228 U. S. 161.

It is true that under the corporation act of 1919 a corporation organized under the laws of this state is authorized to borrow money at such rate of interest as the corporation may determine, regardless of statutes upon the subject of usury, and that by reason of this enactment, as well as the provisions of the statute relating to interest, a corporation is precluded from interposing the defense of usury in any action, but we do not understand that these statutory provisions in any way prevent complainant herein from filing and maintaining a bill for an accounting as to its transactions with defendant. Union National Bank v. L. H. A. & Co. Ry. Co., 145 Ill. 208. Whether or not complainant has a meritorious cause of action can be determined only after a full hearing of the evidence and not upon a motion to dissolve a preliminary injunction.

10

Thereafter, on May 14, 1932, defendant moved to
dissolve the injunction, relying upon the allegations of his
answer to support said motion. This motion was granted by
the court, and it was ordered that the injunction be dissolved in
this case and effect be made including May 14, 1932. The present
appeal is from the order of May 14, 1932.

Appellant contends that the injunction should be
dissolved because appellee, which is an Illinois corporation,
is prohibited by the general corporation act of 1918 from acting
in the state of Iowa; that the court having the matter in

dispute was erroneous because the court was holding before it
whether the bill and the answer covered therein all of the allegations
of the bill were denied; that the original bill of complaint was
not properly verified and did not contain a sufficient allegation;

That substantially the identical answer therein the motion
therein was held sustained by the Supreme Court of the United States
in the case of Windsor v. Superior, 282 U.S. 121.

It is true that under the corporation act of 1918 a
corporation organized under the laws of this state is authorized
to do any and every act that may be necessary or proper in the
exercise of its powers, and that it may sue and be sued in any
court of competent jurisdiction, and that it may do any and every
act that may be necessary or proper in the exercise of its powers.

It is true that under the corporation act of 1918 a
corporation organized under the laws of this state is authorized
to do any and every act that may be necessary or proper in the
exercise of its powers, and that it may sue and be sued in any
court of competent jurisdiction, and that it may do any and every
act that may be necessary or proper in the exercise of its powers.

It is true that under the corporation act of 1918 a
corporation organized under the laws of this state is authorized
to do any and every act that may be necessary or proper in the
exercise of its powers, and that it may sue and be sued in any
court of competent jurisdiction, and that it may do any and every
act that may be necessary or proper in the exercise of its powers.

It is urged that when the sworn answer fully and unequivocally denies all the material allegations of the bill upon which complainant's equities rest, an injunction will be dissolved. This rule is not applicable to the situation involved in the case at bar for the reason that defendant's answer not only does not deny numerous material allegations contained in the bill of complaint, but on the contrary admits them. The controversy between the parties relates to the construction to be given to the provisions of the contract above noted, the complainant contending that it provides for a series of loans from defendant to complainant and defendant contending that the contract must be construed as an agreement on the part of complainant to pay for certain services to be rendered to it by defendant. It seems obvious that a proper construction of the contract can only be determined after there has been a hearing upon the merits of the case and the transactions between the parties have been shown to the court. The intention of the parties is to be ascertained from the whole transaction, which involves a consideration of the conduct of the parties as well as their written agreement. Mercantile Trust Co. v. Kantor, 275 Ill. 368. The injunction involved herein was granted for the purpose of preserving the status of affairs pending the final adjudication of the issues between the parties.

We find no merit in appellant's contention that the injunction should be dissolved on account of an alleged insufficiency in the affidavit attached to the original bill of complaint. The insufficiency of the affidavit is not apparent, but in any event, an objection of this kind is waived by a general appearance, answer and motion for dissolution of the injunction. A motion to dissolve operates as a waiver of

It is urged that the treaty is not binding on the United States because it was not ratified by the Senate. This is a mistake. The treaty was ratified by the Senate in 1892, and it is binding on the United States. The treaty is a valid and binding contract between the United States and the Hawaiian Islands. It is a contract that was made in good faith and for the benefit of both parties. It is a contract that has been honored by the United States for many years. It is a contract that is still in force and effect today. The United States is bound by the treaty, and it must honor its obligations under the treaty. The Hawaiian Islands are also bound by the treaty, and they must fulfill their obligations under the treaty. The treaty is a binding contract, and it must be honored by both parties. The United States is bound by the treaty, and it must honor its obligations under the treaty. The Hawaiian Islands are also bound by the treaty, and they must fulfill their obligations under the treaty. The treaty is a binding contract, and it must be honored by both parties.

irregularities. Williams v. Chicago Exhibition Company, 188 Ill. 19; Grand Opera House v. Ripley, 166 Ill. app. 170.

Upon the state of facts shown to the chancellor by the allegations of the bill and answer, we think that he was justified in overruling the motion to dissolve the injunction.

The order of the Superior Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation.

4. *Journal of the American Statistical Association*, 1990, 85, 1039-1048.

27868

INTERNATIONAL LAMP MANUFACTURING
COMPANY, a corporation,

Appellee.

vs.

JULIUS B. LEVIN,

Appellant.

226 T A 648

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT.
COOK COUNTY.

)

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior Court of Cook County entered May 17, 1922, providing for the continuance, until the further order of the court, of an injunction previously granted in this case. It has been consolidated for hearing with No. 27867, in which an opinion has this day been filed, wherein we affirmed the order of the Superior Court overruling the motion to dissolve the injunction, which, by its terms, expired May 17, 1922. The order from which the present appeal is prayed continued this injunction in force until the further order of court and required complainant to give a further injunction bond in the penal sum of \$55,000, which amount is ample for the protection of defendant's interests.

Counsel have filed in this appeal the same briefs that were considered in No. 27867, and as we have reached the conclusion that no error was committed by the trial court in refusing to dissolve the original injunction, there is no necessity to discuss the propriety of continuing the injunction. The reasons which were held sufficient to sustain the court's action in refusing to dissolve the injunction are equally applicable in the present appeal.

The order of the Superior Court is affirmed.

AFFIRMED.

Barnes, F. J., and Gridley, J., concur.

844 A TAGG

THE FOLLOWING IS A SUMMARY OF THE INFORMATION RECEIVED FROM THE ABOVE NAMED SOURCES:

1. The information received from the above named sources is of a confidential nature and should be handled accordingly.

2. The information received from the above named sources is of a confidential nature and should be handled accordingly.

3. The information received from the above named sources is of a confidential nature and should be handled accordingly.

4. The information received from the above named sources is of a confidential nature and should be handled accordingly.

5. The information received from the above named sources is of a confidential nature and should be handled accordingly.

226 11 518

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October,
in the year of our Lord one thousand nine hundred and
twenty-one, within and for the Second District of the State
of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

William C. Bolton, et al,
appellees,

vs.

Mary J. Bolton and A.J. Schneider,
administrators of the Estate of
Alexander Bolton, deceased, and
Mary J. Bolton,
appellants,

22614. 249

Appeal from Hancock.

PARTLOW, J.

Appellants, Mary J. Bolton and A. J. Schneider, as administrators of the estate of Alexander Bolton, deceased, filed their final report as such administrators in the county court of Hancock county, in which they did not charge themselves with a note of \$11,598.00 left by the deceased. Notice of final settlement was given and appellees, who are the heirs of the deceased, filed objections to the report, which objections were sustained and the court held that Mary J. Bolton was entitled to one-half of the proceeds of the note and the estate was entitled to the other half. An appeal was prosecuted to the circuit court where it was held that the administrators should charge themselves with the entire proceeds of the note, and that the proceeds should be distributed one-third to the widow and two-thirds to the heirs. From that order this appeal was prosecuted, and it was agreed that the appeal should be to this court and not to the Appellate Court of the Third District.

Alexander Bolton, the deceased, for many years, ~~lived~~ lived on a farm near Nauvoo, in Hancock County. He had been married twice but all of his children were by his first wife, who was a sister of Charles A. Clark. On October 24, 1912, he was married to his second wife, one of the appellants herein, who was a daughter of Charles A. Clark. At that time he was about seventy-five years old and his wife was about forty-five years old. A short time before his second marriage he acquired title to

2261.A. 618

Division of the State of New York

Special Agent in Charge

NY

Very Respectfully,
J. Edgar Hoover

March 10, 1900

Dear Sir: I have the honor to acknowledge the receipt of your letter of the 8th inst.

in relation to the case of James J. Connelley, deceased, alias
alias this I refer to your communication in the county court of
Hancock County, in which they are now under consideration and
note of \$11,000.00 paid by the deceased. Notice of such notice
has been given and received, who are the heirs of the deceased,
three children to the deceased, which children were mentioned
and the court held that they are entitled to one-half
of the proceeds of the sale of the estate and entitled to pay
thereof. It is noted that the estate was sold and the proceeds
it was held that the administrators were entitled to receive
the entire proceeds of the sale, and that the proceeds were to be
distributed one-third to the widow and two-thirds to the heirs.
From that order this matter was prosecuted, and it was found
that the request should be to this court and not to the local
court of the third district.

Respectfully,
on a farm near Havana, in Hancock County. He had been married
twice but all of his children were by his third wife, who was a
native of Ireland. He died on January 10, 1900, in his
85th year. He was of the Catholic faith and was a
member of the Catholic Church. He was a very good man and
a very good citizen. He was a very good man and a very good
citizen. He was a very good man and a very good citizen.

several tracts of land in California. In February, 1914, Bolt and wife went to California to the home of his daughter, Belle B. Balmer, who lived near Loomis in that state. While there Bolton sold to Christ Asmusson and Soline Asmusson, his wife, several of these tracts of California land for \$15,000.00. Of this amount \$3,000.00 was paid in cash and \$12,000.00 was paid by a note which is in words and figures following:-

"\$12,000.00

February 9th, 1914.

On or before six years after date, without grace, we promise to pay to the order of Alexander Bolton or wife, M.J. Bolton, Twelve Thousand and no/100 dollars, for value received, with interest from date at the rate of five per cent per annum until paid. Principal and interest payable in U.S. Gold coin at Nauvoo, Illinois, and in case suit is instituted to collect this note, or any portion thereof, we promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit.

Christ Asmusson

Mrs. Soline Asmusson

Belle B. Balmer. "

This note was delivered to Bolton and at his death was found in his safety deposit box in the State Bank of Nauvoo. Prior to his death three payments had been made on the note, one of \$1,000.00 on August 11, 1914, one of \$1500.00 on September 12, 1914, and on December 31, 1914, the interest was paid to February 9, 1915. These payments were made by drafts, at least two of which were payable to Alexander Bolton or wife, Mary J. Bolton. They were sent to Bolton and the money was credited to Bolton's account. Subsequent to Bolton's death the balance of the note, amounting to \$11,598.00 was paid to A.J. Schneider, who was the cashier of the bank and also one of the administrators of the estate, and was deposited in the bank where it now is held pending this appeal.

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by a note which is in words and figures following:-

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Alexander Bolton died September 14, 1918, leaving surviving him his widow, Mary J. Bolton, and William L. Bolton, Edgar L. Bolton, Mary A. Hollin, Belle B. Palmer and Maggie Hollin, his children, and Katherine L. Bolton, Lawrence L. Bolton, Laura L. Bolton, and Martin L. Bolton, children of a deceased son, and Earl A. Bolton and Myrna L. Bolton, children of another deceased son, as his only heirs at law. Mary A. Hollin, a daughter, died subsequently to her father and John T. Hollin and Edgar Bolton are executors under her last will and testament.

Mary J. Bolton, the widow, and A. J. Schneider were appointed administrators of the estate of Alexander Bolton. The note in question was included in the inventory of the estate, together with a statement by Mary J. Bolton, the widow, that the note was in the possession of the State Bank of Marvoo and was claimed by her and that it was described in the inventory solely for the purpose of giving all persons interested notice of its existence and that it was no part of the estate but belonged to Mary J. Bolton individually. In the final account the administrators do not charge themselves with the proceeds of the note, but stated that it was claimed by Mary J. Bolton. The personal estate of Alexander Bolton, exclusive of this instrument, amounted to over \$23,646.57. Of this amount Mary J. Bolton received her widow's award of \$1500.00 and \$5250.00 in money and bank stock, and \$1750.00 in cash, and the heirs have received their distributive shares as shown by two reports of the appellants. The sole question upon this appeal is as to the ownership of the proceeds of this note.

In *Erwin vs. Felter*, 283 Ill. 36, Emily C. Rusk obtained from the bank four certificates of deposit, each payable to herself or Mrs. Martha D. Erwin, or the survivor of either. The certificates were left with the bank and receipts were delivered to Mrs. Rusk, each of which recited that a certificate of deposit had been delivered to the bank, payable to Mrs. Emily C. Rusk or Martha D. Erwin, or the survivor, and in the event of the death

of Emily C. Musk, before the death of Martha D. Erwin, the bank was authorized by Mrs. Musk to pay the amounts due to Martha D. Erwin. Mrs. Musk died and the question was as to the ownership of these four certificates. The Supreme Court held that they were the property of Martha D. Erwin, the daughter. The facts in that case are not exactly like the case at bar but certain rules of law were announced which are applicable here. It was held that a joint tenancy is not confined to real estate but may exist in personal property. The mother and daughter were held to be equally entitled to withdraw the entire deposit. Each held during their joint lives subject to this right in the other, and upon the death of either, the other held by the same title under the instrument creating a joint tenancy. The right of each to receive payment from the bank was the same, and vested at the time the bank issued the certificates. The certificates were not gifts in the nature of testamentary dispositions of property and did not constitute gifts to take effect after the donor's death. It was also held that the rule that the deposit of money in a bank by one person in the name of another and the retention of the evidence of the deposit by the person in whose name the deposit was made, does not apply in cases like this. The bank was authorized to pay Mrs. Erwin not merely as the agent of Mrs. Musk, but as a payee of the certificates and in pursuance of this contract the bank for years paid the interest to Mrs. Erwin. The writings constituted a contract between the parties and on the death of Mrs. Musk the entire fund vested in Mrs. Erwin.

We think this case is conclusive of the question here presented. In that case the instruments under consideration were certificates of deposit and contained words of survivorship, while the instrument in question in this case is a note without any provision as to survivorship. In other respects the instruments, and the law applicable thereto, are identical. A certificate of deposit may be considered as a promissory note. *Telford vs. Patton*

144 Ill. 611. The Erwin case is binding on this court and settles conclusively that there can be a joint tenancy in personal property and that Alexander Bolton and wife were joint tenants of this note; also that each, during the joint lives, held subject to the rights in the other, and upon the death of either the other held by the same title; that the right of each to receive payment was the same; that the note was not a gift in the nature of a testamentary devise and did not constitute a gift to take effect after the donor's death; that the rule of law applicable to cases where a deposit of money is made in a bank by one person in the name of another does not apply in this case.

It is contended by appellants that the decision announced in the Erwin case is not in accord with the weight of authority. Even if it be conceded that the Erwin case is not in accord with the weight of authority, it would be binding on this court and controlling in this case. However, we think that case is in accord with the weight of authority. In Ryhner vs. Reichert, 90 Ill. 312, it was held that the delivery of a note to one of two or more parties will operate as a delivery to all of them. In Carr vs. Bauer, 61 Ill. App. 509, the note was payable to Thomas Bauer or wife, and it was held that an instrument of this kind is evidence of a joint contract and that both parties are entitled to sue jointly thereon. Also that the reasonable intendment is that the note was given to Bauer and wife and, as they had jointly asserted their rights to sue, it is doing no violence to the intent of the instrument to hold that "or" means "and", and in support of this holding, the following cases are cited: Parker vs. Carson, 64 N. Car. 563; Knight vs. Jones 21 Mich. 121; Westgate vs. Healy, 4 R. I. 521; Willoughby vs. Willoughby, 5 N. H. 161. And, in addition to these authorities may be cited Young vs. Ward, 21 Ill. 223; Osgood vs. Pearson, 4 Gray, 455. In Proser vs. Rawley, 64 Ill. App. 446, it was held that the possession of a note by one shown on the face of the note to be a joint payee

can be regarded only as prima facie evidence of the title there disclosed. In *Lemen vs. State of Grote*, 203 Ill. App. 50, the certificate of deposit was in the name of the husband and wife, payable to the order of either, before or after the death of the other, and it was held that the funds were held in equal shares by the husband and wife and that the husband impliedly made a gift to the wife of one-half of the proceeds of said certificates and, notwithstanding the fact that it may have been their intention that the funds should be held jointly with right of survivorship, the funds would still be held in common and the right of survivorship would not obtain. In *Norman vs. Kullman*, 93 Kan. 792, (145 Pac. 818) the deceased loaned his money and took a promissory note, payable to the order of himself, or in case of his death, to his wife, and it was held in litigation between his administrator and his widow that the widow was entitled to the whole of the proceeds of this note. In *Colyer vs. Cook* 28 Ind. 272, (62 N.E. 655) a husband in payment for land conveyed by him accepted notes payable to himself or his wife, and the mortgage was made to him alone securing the notes, which were found among his effects after his death. His wife survived him and, in a contest over the proceeds of the notes, it was held that the wife was the owner of one-half of the notes. In *Bunker on Negotiable Instruments*, page 49, Note 4, it is stated that a note payable to two or more persons imports presumptively a joint and co-equal interest, but this does not preclude proof that the consideration moved from them in separate and unequal amounts. In *Spitler vs. Kalding*, 133 Cal. 500 (65 Pac. 1040) it was held that the act of a father in loaning his money and taking a note and mortgage in the name of his daughter was prima facie evidence of a gift to the daughter, even if the father kept possession of the note and mortgage.

From all these authorities we hold that the note was owned Jointly by Alexander Bolton and Mary J. Bolton, his wife, and

that upon his death one-half of the proceeds belong to his estate and the other half belonged to his widow, Mary J. Bolton.

Appellees contend that the evidence shows that the consideration for the note was furnished entirely by Bolton; that the land sold by Bolton which furnished the consideration was his separate property and his wife had no interest therein; that the note was taken in the name of both for the purpose of convenience in order that either might receive payment thereon; that Bolton had no intention and expressed no intention, to give his wife the note or the proceeds thereof, and as he had possession of the note up to the time of his death, it is contended that these facts take this case out of the operation of the rule of law above announced. A great deal of testimony was taken as to the source from which the proceeds of this note came. We think such an inquiry was entirely immaterial. The deceased had an absolute right to have the note made as it was made, and upon its delivery to him it became effective and the title was vested jointly in him and her.

We also think the evidence sustains the contention of the appellant that it was the intention of Alexander Bolton to give one-half of this note to his wife. In a conversation at the breakfast table at the home of Mrs. Charles A. Clark in Chicago, the second day after his marriage, Alexander Bolton stated that it was his intention to give his California land to Mrs. Bolton. Appellants offered to prove that Alexander Bolton had stated in another conversation, a short time before his marriage, that when he and Mrs. Bolton were married he intended to give her his California land. This evidence was objected to by the appellees and the objection was sustained, and we are of the opinion that such evidence should have been admitted. Alexander Bolton went to California in 1914, to the home of his daughter, Mrs. Palmer, and at the time the land was sold to the Nassussens, Mrs. and Mrs. Bolton, Mrs. Palmer and Mr. and Mrs. Nassussen were present.

[illegible]

The parties met at the home of Mrs. Palmer and the deed was delivered and the note was prepared. It was written by Mrs. Palmer. She made it payable to Alexander Bolton or wife. It was read aloud, and Alexander Bolton made no objection to the form of the note or to the fact that his wife's name was written in the note as a payee. There was evidence that it was made payable to both for convenience, but this evidence was simply the conclusion of the witnesses. Even if such testimony was not the conclusions of the witnesses, but were statements of fact, such statements were not sufficient to overcome the evidence tending to show an intention of Bolton to vest in his wife an interest in the note. Convenience could well prompt in him such an intention. Appellants offered to prove that when certain payments were made that Bolton paid a part of the proceeds of this note to his wife, but this evidence was excluded, and we think improperly so. There is also evidence in the record tending to show that the drafts with which the money was paid were made payable to Alexander Bolton or wife.

The circuit court was in error in holding that the entire proceeds of the note belonged to the estate, and the county court was correct in its holding that the estate was the owner of one-half of the proceeds of the note and that the other half was the property of Mary J. Bolton, and the judgment of the circuit court will be reversed and the cause remanded with directions to enter a final order in accordance with the views herein expressed.

Reversed and remanded with directions.

6979

2261A-648

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present—The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

406 : 1922

the opinion of

the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State of
Illinois,
Defendants in Error,

226 I.A. 648

vs.

Error to Lake

Sam Salk and Charles Pappenga,
Plaintiffs in Error,

Jones, J.

The plaintiffs in error, Sam Salk and Charles Pappenga were convicted in the County Court of Lake County upon an information containing six counts. The first count charged an illegal purchase of intoxicating liquors. The third count charged unlawful transportation of intoxicating liquors and the fifth count charged that the defendants did unlawfully cause intoxicating liquors to be transported.

Before entering upon the trial, a motion was made by the plaintiffs in error to quash the venire for a jury on the ground that it was not summoned as provided in Section 110 of the "Courts" Act. The record shows that the County Court of Lake County convened for the April Term, 1921, on the 11th day of April. The venire was ordered issued on the 28th day of April. The information in this case, however, was not filed until May 7, 1921. The defendants were arraigned and pleaded not guilty. Upon the call of the case for trial on May 10th, the court ordered a special venire to fill the panel directed to the sheriff of the county. Section 11- of the said Act provides that juries in the County Court shall be drawn and summoned in the same manner as provided for the drawing and summoning of juries in the circuit court, unless otherwise ordered by the court. That section also provides that on the first day of the term, if no jury has been drawn in the manner provided for drawing juries in the circuit court, the court shall call the docket to ascertain what cases are for trial by jury and order a jury summoned. As noted above the jury in this case was drawn in the

latter manner. It is contended that since the information in this case was not filed until May 7th neither of the parties could have called for a jury on the first day of the term nor could they have done so on April 28th and that unless one of the parties called for a jury the panel was not legally ordered. It is also contended that the venire ought to have been quashed on defendants' motion because a part of the jurors were summoned by the sheriff who was a witness on behalf of the People. Upon hearing the motion the court overruled it but announced that any juror summoned by the sheriff would be excused at the instance of the defendants, if challenged. Plaintiffs in error did not avail themselves of such offer nor make any effort to do so, but proceeded to the selection of a jury from the empaneled jurors. They can not now complain of the prejudice or interest of the sheriff.

If there was a necessity for a jury at the April term, the jurors should have been obtained under the provisions of Section 110 of the act entitled "Courts". When it appeared that no jurors had been drawn from the box the court should have ascertained on the first day of the term if there were any cases for jury trial and if there were any, a venire should have thereupon been ordered. When a panel is thus obtained it may be retained for the trial of all cases at that term. If any vacancies shall occur in the panel the court may order the sheriff to fill the same with talesmen. In this case the court did not on the first day of the term order a venire to issue but did so on a later day. This was irregular but is not such a departure ^{it} that will render the venire invalid when challenged. The court had an undoubted right to subsequently order talesmen summoned to fill vacancies.

The evidence in this case shows that the plaintiffs in error and three other men were with a big motor truck on the night of May 6th, 1921 about three miles from Grays Lake in Lake County, Illinois. The truck was unable to move because the rear end was off the hard road and into a ditch. There was in the truck and along the road beside it 124 cases of liquor, a portion of which

latter manner. It is contended that since the information in this case was not filed until May 7th neither of the parties could have called for a jury on the first day of the term nor could they have done so on April 23rd and that unless one of the parties called for a jury the panel was not legally ordered. It is also contended that the venire ought to have been quashed on defendant's motion because a part of the jurors were summoned by the sheriff who was a witness on behalf of the people. Upon hearing the motion the court overruled it but announced that any juror summoned by the sheriff would be excused at the instance of the defendant, it being understood that defendant in error did not avail themselves of such offer nor make any effort to do so, but proceeded to the selection of a jury from the empanelled jurors. They can not now complain of the proceedings or interest of the sheriff.

If there was a necessity for a jury at this point, the jurors should have been obtained under the provisions of Section 110 of the act entitled "Courts". When it appeared that no jurors had been drawn from the box the court should have assembled on the first day of the term if there were any cases for jury trial and if there were any, a venire should have thereupon been ordered. When a panel is thus obtained it may be retained for the trial of all cases at that term. If any vacancies shall occur in the panel the court may order the sheriff to fill the same with summonses. In this case the court did not on the first day of the term order a venire to issue but did so on a later day. This was irregular but is not such a departure that will render the venire invalid when challenged. The court had an undoubted right to subsequently order talesmen summoned to fill vacancies.

The evidence in this case shows that the defendant in error and three other men were with a big motor truck on the night of May 1st, 1922, near the intersection of the main road and the old road and into a ditch. There was in the truck and along the road besides it 200 cases of liquor, a portion of which

was afterwards analyzed by a chemist and tested 3.02 per cent alcohol by volume. An officer came along and arrested the defendants and took possession of the liquor. The evidence further shows that the plaintiff in error, Salk, admitted to certain witnesses that he was "the boss of the stuff" and that he was the owner thereof. At the time the officer came to where the truck was located as above described, Pappengea and another man were sitting in the seat of the truck and the witness, Attridge testified that Pappengea told him the liquor was good beer. One of the defendants at the time the officer came upon them stated in the presence of the others that they were taking the load to Fox Lake.

Pappengea was found guilty by the jury under the third count which charged unlawful transportation of intoxicating liquors and judgment was entered against him that he pay a fine of \$100 and be confined in the county jail for twenty days. We believe the evidence in the case warranted the finding of the jury and the judgment of the court as to Pappengea.

Plaintiff in error, Salk, was found guilty by the jury under the first count, charging an unlawful purchase of intoxicating liquors and also under the fifth count charging that he unlawfully caused intoxicating liquors to be transported. There is not a particle of evidence in the record tending to show that any of the liquor was purchased by Salk or anyone else. No effort was made to show a purchase. We express no opinion as to how he obtained it or how he came into possession of it or whether or not he was the owner of it. Outside of ~~an~~ alleged admission claimed to have been made by him there is no proof that he was the owner of it. In this case the first count should not have been submitted to the jury because there was no evidence in the case tending to show the guilt of any of the defendants under that count.

Inasmuch as the judgment of conviction entered against Salk was under the first count as well as the fifth, the entire judgment against him must be reversed. The Supreme Court of this State in *People vs. Gaul*, 233 Ill. 630, has said that "The judgment of the county court, although based upon different counts of the information

was afterwards analyzed by a chemist and tested 0.02 per cent

alcohol by volume. An officer came along and arrested the de-

fendants and took possession of the liquor. The witness further

shows that the plaintiff in error, Galt, admitted to certain wit-

nesses that he was "the boss of the stuff" and that he was the

owner thereof. At the time the officer came to where the truck

was located as above described, he engaged and another man were

sitting in the seat of the truck and the witness, although not

called that Galtengor told him the liquor was good beer. One of the

defendants at the time the officer came upon them stated in the

presence of the others that they were taking the load to New York.

Galtengor was found guilty by the jury under the third count

which charged unlawful transportation of intoxicating liquors and

judgment was entered against him for a fine of \$500 and for

confinement in the county jail for twenty days. We believe the evi-

dence in the case warranted the finding of the jury and the judgment

of the court as to Galtengor.

Plaintiff in error, Galt, was found guilty by the jury under

the first count, charging an unlawful purchase of intoxicating

liquors and also under the fifth count charging that he unlawfully

carried intoxicating liquors to be transported. There is not a

particle of evidence in the record tending to show that any of the

liquor was purchased by Galt or anyone else. No effort was made

to show a purchase. No express or detention as to how he obtained

it or how he came into possession of it or whether or not he was

the owner of it. Outside of an alleged admission claimed to have

been made by him there is no proof that he was the owner of it.

In this case the first count should not have been admitted to the

jury because there was no evidence in the case tending to show the

guilt of any of the defendants under that count.

Inasmuch as the judgment of conviction entered against Galt

was under the first count as well as the fifth, the entire judgment

against him must be reversed. The Supreme Court of this State in

People vs. Galt, 238 Ill. 500, has said that "the judgment of the

county court, although based upon different counts of the information

is so far a unit that it should be either reversed in whole or affirmed in whole." See also People vs. Powers, 200 Ill. App. 536; People vs. Goldberg, 210 Ill. App. 422.

Inasmuch as the judgment against Salk must be reversed for the reasons above stated and remanded to the county court for a new trial, we express no opinion as to his guilt or innocence, under said fifth count of the information.

The judgment against plaintiff in error, Appengee is affirmed and the judgment against the plaintiff in error, Salk, is reversed and remanded.

Affirmed in part and reversed in part.

is no bar a writ that it should be either reversed in whole or affirmed in whole." See also People vs. Powers, 200 Ill. App. 585; People vs. Goldburg, 210 Ill. App. 482.

Inasmuch as the judgment against Kalk must be reversed for the reasons above stated and remanded to the county court for a new trial, we express no opinion as to his guilt or innocence, under said fifth count of the information.

The judgment against plaintiff in error, therefore is affirmed and the judgment against the plaintiff in error, Kalk, is reversed and remanded.

Affirmed in part and reversed in part.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this . . . 6th . . . day of
Sept. . . . in the year of our Lord one thousand
nine hundred and twenty-~~two~~

Justus L. Johnson
Clerk of the Appellate Court.

7024

257

226 I.A. 648

AT A TERM OF THE APPELLATE COURT

begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present—The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 1 1922

the opinion of

the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Charles Samuelson,
appellant,

2261A. 638

vs.

Appeal from Winnebago

Rockford Chamber of Commerce,
et al.,
appellees,

Jones, J.

The appellant, Samuelson, who was the plaintiff below, sued the Rockford Chamber of Commerce and others in assumpsit under a written contract of leasing of 193 acres of land to be used by the United States Government in building Camp Grant. The declaration avers that the defendants agreed to pay for damages to the crops of the plaintiff by the United States Government. There were two instruments, set up in the declaration and introduced in evidence, alleged to be papers relating to a single contract. The first of them known as "Plaintiff's Exhibit 1" provides for a leasing of the premises by the plaintiff to C. A. Dickinson, trustee for the Rockford Chamber of Commerce or his assignee to be used for a training camp or cantonment purposes with the right to remove buildings and improvements. It further provides, "Second party to pay an annual rent of \$20.00 per acre payable semi-annually beginning Jan. 1, 1918 and every six months thereafter (\$5.00 per acre per year for the first year shall be deducted from said first year's rent and placed in the hands of S. H. Burpee and applied to crop damages as per separate contract with the Rockford Chamber of Commerce) such rent shall be considered as beginning to run on March 1, 1917, and the rental year shall terminate with March 1st of each succeeding year". The second instrument known as "Plaintiff's Exhibit 3" is dated June 23, 1917 and is as follows.

"In consideration of the Rockford Chamber of Commerce of Rockford, Illinois subscribing and paying the sum of \$25,000.00 for damages to crops of the undersigned, the undersigned hereby agrees to rent their respective tracts of land as provided in the lease, sub-

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"In consideration of the foregoing Chapter of Commerce of Rock-
ford, Illinois subscribing and paying the sum of \$25,000.00 for stock
and to show of the indebtedness, the said Chapter of Commerce, Rock-
ford, Illinois respective trusts of land as provided in the laws, and

2
ject to certain changes required by them, to the United States Government for the sum of \$15.00 per acre, the first year and \$20.00 the following year, \$5.00 deducted from the rent the first year are to be applied for damages to the crops in connection with the \$25,000.

Changes above mentioned to be made in the lease are that the owners of the farms are to get rent from March 1, 1917, and notice of termination of the tenancy of any year is to be given them the first day of July preceding the first day of March of the year the tenancy is to be ended.

The Chamber of Commerce hereby agrees to pay the sum of \$25,000 in accordance with the above agreement".

Exhibit 3 is not an original contract but is a copy of the body of one which was signed by the Rockford Chamber of Commerce and the other defendants in the case, and also by certain farmers. The exhibit contains the typewritten names of the defendants but not those of the farmers.

The plaintiff testified that at no time did he ever see the original of Exhibit 3; that he never signed the original and that Exhibit 3 was handed to him at the time he signed Exhibit 1. Exhibit 1 was dated June 30, 1917 but was not executed until September 4 or 5. Exhibit 3 was dated June 25, 1917. There is no proof that it was delivered to him by any of the defendants or by anyone authorized by them to deliver it. Exhibit 1, the only paper signed by the plaintiff, contained an express provision that all the premises not used by the United States Government or the War Department thereof are reserved until the growing crops thereon are cut and harvested. At the time this instrument was executed the farm was largely devoted to corn, potatoes and other crops. The plaintiff was required by the Government to leave the buildings in September and he had a sale of all of his personal property on the 12th of that month. He was not allowed to go about the buildings after the 12th but he was not in any way prevented from tending the corn and potatoes and nobody molested him. He testified that a written demand for possession was given him by an officer; that he

lost to certain changes required by them, to the extent of
Government for the sum of \$10.00 per copy, and there were
\$20.00 for the following year, \$10.00 for each year for the first
year and to be applied for each year to the extent of \$10.00
with the \$20,000.
Changes above mentioned to be made in the future and that the
members of the future and to get more than \$10,000, and that
of termination of the future of any year is to be given and the
first day of July preceding the first day of March of the year the
terminating is to be ended.
The number of members having access to the sum of
\$20,000 in accordance with the above provisions.
Article 2 is not an original contract and is a copy of the
body of one which was signed by the President, and that of members of
the other districts in the state, and that by certain members.
The article covering the provisions of the future is to be
not those of the future.
The President testified that he did not sign the same and that
signature of Article 2; that he never signed the original of the
Article 2 was handed to him at the time it signed Article 1.
Article 1 was dated June 22, 1911, but was not executed until after
the 4th or 5th Article 2 was dated June 22, 1911, but was not
that it was delivered to him by one of the members of the group
authorized by them to deliver the Article 1, the only person
the plaintiff, contained an express provision that all the
provisions set out by the United States Government in the
provisions of the future and the future and the future
are not and harmonized. At the time this instrument was executed the
form was largely awarded to each, members and other means. The
Article 1 was regulated by the Government to have the future of the
future and to be a part of the future and to be a part of the
future of the future. The future and to be a part of the future
The future and to be a part of the future and to be a part of the
future and to be a part of the future and to be a part of the

was unable to state whether it was for a part or all of the premises. He offered testimony to show that there was an excellent crop of corn on 58 acres of the land and that it stood in the field until December. He did not harvest any of the crops and the purpose of his suit is to recover the value thereof from the Chamber of Commerce. At the close of the plaintiff's case the defendants moved the court to instruct the jury to find for the defendants and tendered a peremptory instruction therefor which motion was denied. The court indicated that there was no evidence that the plaintiff had been prevented by the Government from harvesting his corn, potatoes and some grass but that there was some evidence tending to show that the plaintiff was deprived by the Government of the benefit of the crop on a small piece of land near the buildings. Upon motion the court excluded all evidence relating to other damages from the jury and limited the plaintiff's right of recovery to \$75.00, being the amount of damages the plaintiff himself had fixed for the loss of the crops on the small piece of land near the buildings.

When the trial court had indicated its views of the case under the evidence in the latter part of the day, the plaintiff requested the court to grant him until the next morning to produce witnesses to prove that the government had taken possession of the entire farm on or about September 15, 1917 and that plaintiff was not thereafter permitted to go on it or to remove anything therefrom and asked the court to adjourn until the next morning. He also offered to prove that some committee had appraised his damages at \$1,845.00 and had tendered him a check for that amount which he had refused. This tender was not made by the defendants or any of them and was apparently made under the supposition that the plaintiff himself was a party to the original of Exhibit 3. The court, in the exercise of its discretion, refused the plaintiff's request to postpone the trial until the next morning to enable plaintiff to secure additional evidence. The defendants offered no evidence. The jury returned a verdict fixing the plaintiff's damages at \$75.00 and the court entered judgment on the verdict after over-

was unable to state whether it was for a part or all of the evidence.
He offered testimony to show that there was an excellent crop of corn on 55 acres of the land and that it stood in the field until December. He did not remove any of the corn and the purpose of his suit is to recover the value thereof from the Chamber of Commerce at the close of the plaintiff's case the defendants moved the court to instruct the jury to find for the defendants and rendered a peremptory instruction therefor which motion was denied. The court indicated that there was no evidence that the plaintiff had been prevented by the Government from harvesting his corn, potatoes and such crops but that there was some evidence tending to show that the plaintiff was deprived by the Government of the benefit of the crop on a small piece of land near the buildings. Upon motion the court excluded all evidence relating to other damages from the jury and on the small piece of land near the buildings.
When the trial court had indicated the views of the case under the evidence in the latter part of the day, the plaintiff requested the court to grant him until the next morning to produce witnesses to prove that the Government had taken possession of the entire farm on or about September 15, 1934 and that plaintiff was not thereafter permitted to go on it or to remove anything therefrom and asked the court to adjourn until the next morning. He also offered to prove that some committee had examined his damages at \$1,845.00 and had tendered him a check for that amount which he had refused. This tender was not made by the defendants or any of them and was apparently made under the impression that the plaintiff himself was a party to the original of Exhibit 8. The court, in the exercise of its discretion, refused the plaintiff's request to postpone the trial until the next morning to enable plaintiff to secure additional evidence. The defendants offered no evidence at the jury returned a verdict finding the plaintiff's damages at \$1,845.00 and the court entered judgment on the verdict after over-

ruling the plaintiff's motion for a new trial in support of which the plaintiff filed numerous affidavits setting up the additional evidence he would offer in case a new trial be awarded.

It is the contention of the appellant, Samuelson, that "Exhibit 3 should be deemed a part of his contract and read into it. We are unable to agree with this contention. It is evidenced from the record that the so-called Rockford Chamber of Commerce, a civic body of the City of Rockford, was, through enterprise and public spirit, endeavoring to obtain a site for the cantonment known as Camp Grant which was afterwards located there. As a means to securing the necessary leases from farmers, meetings were held between them and certain members of the Rockford Chamber of Commerce, as a result of which a fund was created. To this fund the Chamber of Commerce contributed the sum of \$25,000 to be used in paying crop damages to the owners of farms who signed the original agreement, a copy of which, (except that it omits the names of the farmers who signed) is known in this case as "Exhibit 3". An examination of this Exhibit will disclose that none of the fund created under the terms of the agreement was to be paid to anyone except to the owners of land who signed the agreement. The original agreement was not offered in evidence but it is admitted by appellant that he did not sign it. Such being the case, he was not a party to it and could claim no benefit under it. Neither can he rightfully contend that it should be read into and made a part of his lease. The fact that \$5.00 per acre was taken from his first year's rental and placed in the fund which ^{was} created under "Exhibit 3", does not convince us that he should be entitled to any benefits from that fund. Under the plain terms of his lease, the rental he was to receive was fixed and definite. The means and methods employed by the Chamber of Commerce in creating the fund to secure leases from others, is of no concern to appellant. Unless "Exhibit 3" can be made a part of the contract between the appellant and the Rockford Chamber of Commerce and those acting for it, appellant can claim nothing from appellees because of the alleged conversion and destruction of his crops.

...the plaintiff's motion for a new trial in respect of which
the plaintiff failed to make any effort to setting up the affidavit
evidence in order to show a new trial to be warranted.
It is the contention of the appellant, however, that the
he should be deemed a part of his contract and read into it.
are unable to agree with this contention. It is evident from the
record that the so-called Rockford Chamber of Commerce, a civic
body of the City of Rockford, was, through enterprise and ability
spirit, endeavoring to obtain a site for the contemplated home
Camp Grant which was afterwards located there. As a result of
securing the necessary leases from various, meetings were held be-
tween them and certain members of the Rockford Chamber of Commerce,
as a result of which a land was created. To this end the Chamber
of Commerce contributed the sum of \$25,000 to be used in buying
crop damages to the owners of farms who signed the original agree-
ment, a copy of which, (except that it omits the name of the
farmers who signed) is shown in this case as "Exhibit B". An exam-
ination of this Exhibit will disclose that none of the items included
under the terms of the agreement was to be paid to anyone except to
the owners of land who signed the agreement. The original agreement
was not offered in evidence but it is admitted by appellant that
he did not sign it. And being the case, he was not a party to
it and could claim no benefit under it. Neither can he rightfully
contend that it should be read into and become a part of his lease.
The fact that \$25.00 per acre was taken from his first year's harvest
and placed in the fund which created "Exhibit B", does not
convey to him any benefit or entitle him to any benefit from that
fund. Under the plain terms of his lease, the benefit he was to
receive was fixed and definite. The amount and method employed by
the Chamber of Commerce in creating the fund to secure leases from
others, is of no concern to appellant. Unless "Exhibit B" can be
made a part of the contract between the appellant and the Rockford
Chamber of Commerce and those acting for it, appellant can claim
nothing from appellant because of the alleged conveyance and

But aside from all of this, even if "Exhibit 3" should be read into and made a part of "Exhibit 1", appellant ought not to recover any greater sum than the amount of his judgment in this case. His lease gave him the right to enter and harvest his crops. This right necessarily carried with it the right to remove them when harvested. The trial court properly found that there was no evidence tending to show that appellant was not permitted by the Government to go on the portion of the premises upon which the crops were and to harvest and remove them. It is quite apparent that he thought, without any good reason therefor, he could avail himself of the benefits of the so-called crop agreement; and because thereof he was willing to abandon his crops to the Government and look for compensation to the damaged crop fund. His conduct clearly indicates such an attitude on his part. It is quite certain that some of those acting for the Rockford Chamber of Commerce were of the impression that Samuelson had signed the original of "Exhibit 3". At the time they were appraising the crop damage of other farmers, they caused an appraisal to be made of damage to appellant's crops. This situation however does not effect the rights of either of the parties, and can not give appellant the right to any portion of the fund which was created under an express agreement for the benefit of other farm owners than appellant.

Appellant assigned error because of the court's ruling in excluding all of the testimony in the case in reference to damage to crops other than to those on a parcel of land containing about three acres. Under our view of the case the court committed no error in this regard. He also complains of the court's refusal to re-open the case as he had requested and to then adjourn court until the next day in order to permit appellant to produce further evidence. Questions of this kind rest very largely in the discretion of the trial court. Appellate courts will not review decisions of trial courts in such matters unless it is quite evident there has been an abuse of discretion. We can not see that

there has been an abuse of discretion in this case. The trial judge knows better than anyone else the condition of his docket, the exigencies of the situation, the necessity for the expeditious handling of business, the propriety of continuing or postponing cases and of many other matters and things connected with the progress and determination of litigation. In the case at bar it may have appeared to the trial judge and no doubt did appear to him that appellant should have had witnesses present in apt time to prove such an important and material fact in the case as that the Government had taken possession of appellant's farm and the crops growing thereon. To close his case without making such proof, and then to ask the court to re-open it and permit him to have the case postponed until the next day, in order to produce witnesses, was to make a request under circumstances which the trial court might very reasonably refuse.

The motion for a new trial was properly denied because there was no material error in the trial and because the matters which appellant claimed he could prove on another trial were not newly discovered evidence but were the things which caused appellant to request the court to postpone the case until he could produce the proof of them.

The appellees have assigned cross-error because the court entered judgment for \$75.00 against them. Under our view of the case, appellant had no right of recovery against appellees. But inasmuch as appellees state in their brief that they do not ask the case to be reversed because of such cross-error and that they prefer to pay the judgment rather than to have the litigation extended, the judgment is, therefore, affirmed.

Judgment affirmed.

there has been an abuse of discretion in this case. The trial judge
known better than anyone else the condition of his books, the
exigencies of the situation, the necessity for the expedition
handling of business, the propriety of continuing or postponing
cases and of many other matters and things connected with the pro-
cess and determination of litigation. In the case at bar it may
have appeared to the trial judge and no doubt did appear to him
that appellant should have had witnesses present in and time to
prove such an important and material fact in the case as that the
Government had taken possession of appellant's farm and the crops
growing thereon. It seems to me that without making such proof, and
then to ask the court to re-open it and permit him to have the case
postponed until the next day, in order to produce witnesses, was to
make a request under circumstances which the trial court might

THE TRIAL COURT'S DECISION.

The motion for a new trial was properly denied because there
was no material error in the trial and because the evidence which
appellant claimed he could prove on another trial was not newly
discovered evidence but were the things which concerned appellant
to request the court to postpone the case until he could produce
the proof of them.

The appellees have assigned cross-error because the court erred
of judgment for \$75.00 against them. Under our view of the case,
appellant had no right of recovery against appellees. But assuming
an appellee stands in their behalf that they do not ask the court to
be reversed because of such cross-error and that they wish to
pay the judgment rather than to have the litigation extended, the
judgment is, therefore, affirmed.
Judgment affirmed.

STATE OF ILLINOIS, } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this — — 6th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty-two.

Justus L. Johnson
Clerk of the Appellate Court.

7081

2261 A. 648

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

present—The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG. 11, 1922, the opinion of
the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

William Kavanaugh, Appellant,

vs.

Appeal from Will

Mary A. Kahler, Appellee,

226 I.A. 648

Jones, J.

The appellant, William Kavanaugh, instituted this suit in assumpsit against the appellee, Mary A. Kahler, to recover \$5,000 paid to her by him under a real estate contract between them. The cause was heard by the court without a jury, the jury having been waived by agreement of parties. The court found the issues in favor of the defendant and this appeal is from a judgment of the trial court upon such findings. Kavanaugh was a tenant farmer and on August 26th, 1919, he entered into a written agreement with Mary A. Kahler whereby he agreed to buy and she agreed to sell two adjoining farms with separate improvements, for the sum of \$50,000. Kavanaugh made a cash payment of \$5,000 and was to pay the balance of \$45,000 on March 1st, 1920. Upon which date Mrs. Kahler was to convey the farms to him by warranty deed in fee simple, clear of all encumbrances.

The contract contained the following provision:- "Said party of the first part further covenants and agrees that she will within forty days of this date deliver to the party of the second part an abstract of title, showing merchantable title in the party of the first part or in the party of the first part and her various children. Said party of the second part shall be allowed fifteen days after receipt of said abstract within which to have said abstract examined and in the event that any material objections are made to the title as aforesaid; the said party of the first part covenants and agrees that she will without any unnecessary delay, take such steps as may be necessary to remove said objections." The contract also contains the following provision:- "And in case of failure of said party of the second part to make either of the payments of any part thereof, or perform any covenants on his part

848 A. 1333

William Kavanagh, Appellant,

Appel from Will

vs.

Mary A. Kahler, Appellee,

1912

The appellant, William Kavanagh, instituted this suit in
 against the appellee, Mary A. Kahler, to recover \$5,000
 paid to her by him under a real estate contract between them.
 The cause was heard by the court without a jury, the jury being
 been waived by agreement of parties. The court found the facts
 in favor of the defendant and this appeal is from a judgment of
 the trial court upon such findings. Kavanagh was a tenant farmer
 and on August 25th, 1912, he entered into a written agreement with
 Mary A. Kahler whereby he agreed to buy and she agreed to sell
 two adjoining farms with separate improvements, for the sum of
 \$50,000. Kavanagh made a cash payment of \$5,000 and was to pay
 the balance of \$45,000 on March 1st, 1920. Upon which date Mrs.
 Kahler was to convey the farms to him by warranty deed in fee
 simple, clear of all encumbrances.
 The contract contained the following provisions: "This party
 of the first part further covenants and agrees that she will within
 forty days of this date deliver to the party of the second part an
 abstract of title, showing marketable title in the
 first part or in the party of the first part and her various child-
 ren. Said party of the second part shall be allowed fifteen days
 after receipt of said abstract within which to have said abstract
 examined and in the event that any material objections are made
 to the title as aforesaid; the said party of the first part
 covenants and agrees that she will without any unnecessary delay,
 take such steps as may be necessary to remove said objections."
 The contract also contains the following provisions: "In the event
 of failure of said party of the second part to make either of the
 above mentioned payments or to remove said objections or to do any

hereby made and entered into, this contract shall, at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and in liquidation of all damages by her sustained."

During the Fall of 1919, appellant went upon the premises and did some plowing and other work. The abstract of title was not prepared and delivered to him within the forty days specified by the contract, but on October 23, 1919 it was delivered by the abstractor to the attorney who had drawn the contract for the parties. The attorney testified that some days afterward he notified Kavanaugh that the abstract was at his office and was informed by Kavanaugh that he would let him know later what to do with it. Kavanaugh did not give the matter further attention until he received notice from Mrs. Kahler that he should have the abstract examined so that if there were any objections she would have ample time to cure them. Kavanaugh got the abstract from her about Christmas 1919 and made no objections whatever to the fact that it was not delivered to him within forty days from the date of the contract. He seems to have attached very little importance to the abstract. He was not at all certain as to whom he would take it for examination. He seemed inclined to take it to a justice of the peace. Afterwards, however, he took it to a firm of attorneys who examined it and pointed out some objections including the existence of three unreleased mortgages. Two of the mortgages were valid liens on the premises and the third was probably barred by the Statute of Limitations many years ago. These mortgages were afterwards released of record and such releases were shown by an extension to the abstract dated February 17th, 1920. No formal list of objections to the title were ever given to appellee or to any one for her but on February 20th, 1920, just eight days before the final payment would become due, appellant called on appellee and returned the abstract to her. She inquired of him what was

the matter and he replied in substance that he did not know and that he was advised by his lawyers not to talk. Mrs. Kahler testified that she never knew until the time of the trial what objections were made to the title by Kavanaugh.

On February 26th, 1920, Mrs. Kahler notified Kavanaugh in writing that she would leave for him at the Joliet Trust & Savings Bank of Joliet, Illinois, on March 1st, 1920, a warranty deed conveying to him the farms in question with instructions to the bank to deliver the deed to him upon receipt of \$45,000 in cash. The notice further stated that thereupon Kavanaugh might have immediate possession of the premises. On February 28th, Kavanaugh wrote to Mrs. Kahler stating that the abstract dated October 4th, 1919, purporting to show the title to the property described in the contract, does not comply with the terms of said contract and that, therefore, he demanded the return of the sum of \$5,000 which he had paid thereunder and further that he claimed the right to cultivate, harvest and sell the wheat planted by him on said premises.

Kavanaugh did not call at the Bank for the deed nor did he pay the balance due on the purchase price or any part thereof. On March 15, 1920, Mrs. Kahler notified Kavanaugh in writing that because of his failure to make such payment she had elected to forfeit and determine the contract and to retain the payment of the sum of \$5,000 made by Kavanaugh thereunder. She further stated in said letter to Kavanaugh that she was ready to remedy any material objection to the title to the premises, if any there be, and she also offered to sell to him either of the two farms at approximately the same price per acre as the original contract called for. It does not appear from the evidence that Kavanaugh ever made any reply to said notice and proposition.

Prior to the date appellant returned the abstract to appellee, he had endeavored to borrow from various individuals enough money to pay the balance due under the contract. His efforts were unsuccessful. Depression in the financial situation had set in after the war. Money was more difficult to obtain and it is evidenced from the facts disclosed by the record in this case that

the matter and he replied in substance that he did not know and that he was advised by his lawyers not to talk. Mrs. Kahler testified that she never knew until the time of the trial what objections were made to the title by Kavanagh.

On February 26th, 1920, Mrs. Kahler notified Kavanagh in writing that she would leave her car at the Hotel West a day or two, on March 1st, 1920, a warranty deed conveying to him the same in question with instructions to the bank to deliver the deed to him upon receipt of \$42,000 in cash.

The notice further stated that Kavanagh should have immediate possession of the premises. On February 26th, Kavanagh wrote to Mrs. Kahler stating that the abstract dated October 4th, 1919, purporting to show the title to the property described in the contract, does not comply with the terms of said contract and that, therefore, he demanded the return of the sum of \$2,000 which he had paid thereunder and further that he claimed the right to sell the premises and sell the wheat planted by him on said premises.

Kavanagh did not call at the Bank for the deed nor did he pay the balance due on the purchase price on any date thereof. On March 15, 1920, Mrs. Kahler notified Kavanagh in writing that because of his failure to make such payment she had elected to forfeit and determine the contract and to retain the payment of the sum of \$2,000 made by Kavanagh thereunder. She further stated in said letter to Kavanagh that she was ready to receive any material objection to the title to the premises, at any time, and she also offered to sell to him either of the two tracts of approximately the same price per acre as the original contract called for. It does not appear from the evidence that Kavanagh ever made any reply to said notice and proposition.

Prior to the late complaint returned the abstract to Kavanagh, he had endeavored to borrow from various individuals enough money to pay the balance due under the contract. His efforts were unsuccessful. Deposition in the financial institution had set in and his money was more difficult to obtain and he was unable to obtain the same.

appellant was unable to raise the money necessary for him to comply with the terms of his contract.

Counsel for appellant claims that under the contract it was the duty of the appellee to deliver to appellant an abstract of title showing a merchantable title at the time of its delivery. They contend that the abstract did not show a merchantable title at that time or in fact at any time, because of the objections which were shown on the trial. They also contend that inasmuch as a merchantable title was not shown by the abstract, appellee did not comply with her part of the contract and therefore she had no right to retain the said sum of \$5,000. The provision of the contract relative to the furnishing of an abstract and to the making and curing of objections thereto is very similar to that generally employed in contracts for the sale of real estate. proper and commonly accepted interpretation of such provision is that the vendor shall have a given time in which to procure an abstract and to deliver it to the vendee; and the vendee shall have a specified time in which he may have the abstract examined. He shall then furnish the vendor with a complete list of objections if any there be. Thereafter the vendor shall have such time as is specified by the contract in which to remove such objections or if no specific time is provided by the contract, then he shall have a reasonable time in which to remove them. In this case although the abstract was not delivered to the vendee within the time provided for by the contract, he accepted it without objection. He retained possession of it almost two months and then within about a week of the time when he should make the final payment, he returned it to the appellee without specifying what, if any, objections there were to the title, with the mere comment that he had been advised by his lawyers not to talk. On the last day before the day set for final payment, he notified Mrs. Kahler that the abstract did not comply with the terms of their contract and that he, therefore, demanded a return of the money paid by him. Even in this notice he failed to submit his objections, without pointing

out to her the specific objections it would be impossible for appellee to remove them. Under the contract she had a right to know what they were and to have reasonable opportunity to cure them. It was the duty of ^{appellant} ~~appellee~~ under the contract to ~~ask~~ know his objections and he had no right to terminate the contract and demand the return of his payment until he had made them known and had given sufficient time to the appellee in which she might remove them. The evidence shows conclusively that appellee offered to comply with every condition of the contract imposed upon her and that if she had been given a reasonable opportunity by the appellant to do so, she would have fully complied with its terms. It further shows that the appellant, because of his inability to procure the money with which to complete his purchase, could not comply with the terms of the contract which were imposed upon him. Therefore, under the express agreement of the parties to the contract, appellee had a right to declare the contract forfeited and to retain the money paid to her. The judgment of the trial court is therefore affirmed.

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terms of the contract which were imposed upon him. Therefore,
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money paid to her. The judgment of the trial court is therefore
affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. { ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 6th day of
Sept in the year of our Lord one thousand
nine hundred and twenty-two

Justus L. Johnson
Clerk of the Appellate Court.

7036

2261.640

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

present—The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on 22nd of April the opinion of
the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Ulysses Swift, Appellee,

22614.649

vs.

Appeal from Winnebago

B. C. Eastwood and J. C.
Stokburger,

Appellants,

Jones, J.

This is an appeal from a decree of the circuit court of Winnebago County in favor of appellee and against appellants who are real estate agents or brokers, for \$300.00 and costs of suit. The original bill alleged that appellee, Swift was in possession of certain real estate in the City of Rockford, under an agreement to purchase the same; that he listed the property for sale on a basis of \$4700.00 net to him; that the appellants had procured a purchaser for the premises and that in making settlement with appellee a mutual mistake was made against appellee in the sum of \$200.00. The bill prayed for an accounting and for a money decree for whatever might be found to be due appellee. The testimony of appellee unquestionably indicated that appellants settled with him on a basis of \$4500.00 net, whereas, appellee claims that under the original agreement he was to have \$4700.00 net. The bill was afterwards amended. It then alleged that appellants while acting as agents for appellee had sold the premises for \$5000.00 and had failed to account to appellee for five hundred dollars less a reasonable commission to appellants for making the sale.

The appellants by their answer alleged that the property was listed with them at \$4500.00 net to the owner with an understanding that they were to receive as their commissions all of the purchase price they procured in excess of that amount and further that they had a right to become the purchasers themselves and that they did in fact purchase the premises from appellee for \$4500.00.

[illegible]

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The court found that Swift listed the property with appellants at a net sum to him of \$4500.00 but that while appellants were acting as agents for Swift they sold the premises to Walter Hall for \$5000.00 and had accounted to appellee on a basis of \$4500.00; that they should have accounted for the full sum of \$5000.00 less a reasonable commission which the court fixed at \$200.00, leaving a balance of \$300.00 still due to Swift.

It is a well settled rule of law that an owner of real estate may employ brokers under an agreement that the owner is to receive a certain amount net for his property and that the brokers may have as their compensation whatever they may realize over and above the net price to the owner. (Carter vs. Love, 206 Ill. 310; O'Neil vs. Sinclair, 54 Ill. App. 278.) But unless the agreement provides that the brokers may retain all they receive in excess of the price fixed by the owner, they must account to the owner for such excess and then look to their reasonable commissions for compensation. (Curfoot vs. Heiman, 52 Ill. 512; Carter vs. Love, Supra.) It therefore is necessary for us to scrutinize the facts in this case in order to determine the questions involved.

The chancellor was unquestionably right in his finding that the owner had listed his property with the appellants at a price of \$4500.00 net to him. Then if there was no agreement between the parties in reference to the excess of sale price over \$4500.00, the brokers must account for such excess. If it was the agreement that they should receive such excess as their commissions, then they are entitled to the same.

The testimony offered on behalf of the appellants tends strongly to show that Swift had said he did not care how much appellants realized for the place over the net price to him and appellee does not deny that he made such a statement. The proof further shows that after the property had been listed for sale with appellants, Stokburger went to see Swift where the latter was employed and asked for a ten days exclusive agency. Swift

The court found that Swift listed the property with appellants at a net sum to him of \$4500.00 but that while appellants were acting as agents for Swift they sold the premises to Walter Hall for \$5000.00 and had accounted to appellee on a basis of \$4500.00; that they should have accounted for the full sum of \$5000.00 less a reasonable commission which the court fixed at \$200.00, leaving a balance of \$300.00 still due to Swift.

It is a well settled rule of law that an owner of real estate may employ brokers under an agreement that the owner is to receive a certain amount net for his property and that the brokers may have as their compensation whatever they may realize over and above the net price to the owner. (Garton vs. Dove, 206 Ill. 370; O'Neil vs. Sinclair, 54 Ill. App. 278.) But unless the agreement provides that the brokers may retain all they receive in excess of the price fixed by the owner, they must account to the owner for such excess and then look to their reasonable commissions for compensation. (Garton vs. Dove, 206 Ill. 370; O'Neil vs. Sinclair, 54 Ill. App. 278.) It therefore is necessary for us to scrutinize the facts in this case in order to determine the questions involved. The chancellor was unquestionably right in his finding that the owner had listed his property with the appellants at a price of \$4500.00 net to him. Then if there was no agreement between the parties in reference to the excess of sale price over \$4500.00, the brokers must account for such excess. If it was the agreement that they should receive such excess as their commissions, then they are entitled to the same.

The testimony offered on behalf of the appellants tends strongly to show that Swift had said he did not care how much appellants realized for the place over the net price to him and appellee does not deny that he made such a statement. The proof further shows that after the property had been listed for sale with appellants, Stokburger went to see Swift where the latter was employed and asked for a ten days exclusive agency. Swift

declined to give it whereupon Stokburger offered Swift a check for \$200.00 and told him he would take the place himself and asked Swift to sign a contract. Swift declined to accept the check or to sign the contract but met Stokburger that night at the office of Swift's Attorney, R. J. Cannell. Here Swift told Cannell that he had sold the premises to Stokburger and he then assigned his agreement to purchase to Stokburger in blank. He also accepted Stokburger's check for \$200.00 and afterwards cashed the same. At the same time Cannell made a memorandum showing the amount of indebtedness against the premises and deducted it from the sum of \$4500.00. There was also deducted \$20.00 as rent which was allowed to Stokburger because Swift desired to retain possession of the premises for thirty days after that time. One or two other very small items were also deducted leaving a balance of \$1761.26. From this sum was deducted the \$200.00 which had been paid by Stokburger to Swift through the aforesaid check, thus making a net balance due to Swift of \$1561.26. This memorandum was pinned to the agreement to purchase which had been signed in blank by Swift and was then kept by Cannell. This meeting at Cannell's office was on May 18th, 1920.

Two or three days prior to June 26th, 1920, Stokburger called the attention of Walter Hall to the premises. Hall had never known of them before. A deal was then made between Stokburger and Hall whereby the latter purchased the premises from Stokburger for \$5000.00 on June 26th, 1920. On the same day Stokburger went to the office of Cannell and there paid to him as attorney for Swift the said sum of \$1561.26 and took up the contract. Hall's name was inserted in the blank left for the name of the assignee in Swift's agreement to purchase and Hall did in fact become the purchaser of the premises.

There is very little controversy about any of the facts above set forth. They lead us to the conclusion that the appellants became the purchasers of Swift's interest in the premises for themselves on May 18th, 1920 at a net price fixed by Swift; that

declined to give it whereupon Stokburger offered Swift a check for \$200.00 and told him he would take the place himself and asked Swift to sign a contract. Swift declined to accept the check or to sign the contract but met Stokburger that night at the office of Swift's attorney, R. J. Cannell. Here Swift told Cannell that he had sold the premises to Stokburger and he then assigned his agreement to purchase to Stokburger in blank. He also accepted Stokburger's check for \$200.00 and afterwards cashed the same. At the same time Cannell made a memorandum showing the amount of indebtedness against the premises and deducted it from the sum of \$4500.00. There was also deducted \$20.00 as rent which was allowed to Stokburger because Swift desired to retain possession of the premises for thirty days after that time. One or two other very small items were also deducted leaving a balance of \$4561.26. From this sum was deducted the \$200.00 which had been paid by Stokburger to Swift through the aforesaid check, thus making a net balance due to Swift of \$1561.26. This memorandum was pinned to the agreement to purchase which had been signed in blank by Swift and was then kept by Cannell. This meeting at Cannell's office was on May 18th, 1920.

Two or three days prior to June 28th, 1920, Stokburger called the attention of Walter Hall to the premises. Hall had never known of them before. A deal was then made between Stokburger and Hall whereby the latter purchased the premises from Stokburger for \$8000.00 on June 28th, 1920. On the same day Stokburger went to the office of Cannell and there paid to him as attorney for Swift the said sum of \$1561.26 and took up the contract. Hall's name was inserted in the blank left for the name of the assignee in Swift's agreement to purchase and Hall did in fact become the purchaser of the premises.

There is very little controversy about any of the facts above set forth. They lead us to the conclusion that the appellants became the purchasers of Swift's interest in the premises for themselves on May 18th, 1920 at a net price fixed by Swift; that

they afterwards sold to Hall for an advanced price and as a matter of course they were entitled to whatever profits were realized from the transaction. However, even if appellants did not become the purchaser of Swift's interest in the premises, we think that under their agreement with Swift they were entitled to retain all they received over \$4500.00. We believe this conclusion is irresistible from the facts which took place at Carmel's office. Every circumstance which occurred there indicates an intention upon Swift's part to permit appellants to retain all they received in excess of the net price.

In view of what we have said we find that under the terms of the contract between appellee and appellants, the latter were to receive as their commission for selling the interest of Swift in the premises in question all they might receive in excess of \$4500; that under such contract they had a right to become the purchasers of such interest; that they did purchase the same on May 18, 1920; that they have paid to appellee all that is due to him arising from the sale of his interest in said premises; that appellants are not equitably bound to account to appellee for any sum arising from the sale of said interest; that appellants were not guilty of any fraud in their transactions and dealings with appellee.

The decree of the circuit court is therefore reversed and this cause is remanded with directions to the chancellor to dismiss the bill as amended for want of equity.

Reversed and Remanded with directions.

they afterwards sold to Hall for an advanced price and as a matter
of course they were entitled to whatever profit was realized
from the transaction. However, even if appellants did not be-
come the purchasers of Swift's interest in the premises, we think
that their claim against the estate is entitled to priority.
All they received over \$4500.00. We believe this conclusion is
irreconcilable from the facts which took place at Campbell's office.
Every circumstance which occurs there indicates an intention
upon Swift's part to permit appellants to retain all they received
in excess of the net price.
In view of what we have said we find that under the terms of
the contract between appellants and appellants, the latter were to
receive as their compensation for selling the interest of Swift in
the premises in question all they might receive in excess of \$4500;
that under such contract they had a right to receive the balance
of the net price, and we believe that the estate is entitled to
that they have paid to appellants all that is due to them arising
from the sale of his interest in said premises; that appellants
are not equitably bound to account to appellants for any sum arising
from the sale of said interest; that appellants were not guilty
of any fraud in their transactions and dealings with appellants.
The decree of the circuit court is therefore reversed and
this cause is remanded with directions to the chancellor to
dismiss the bill as amended for want of equity.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 6th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty-two.

Justus L. Johnson
Clerk of the Appellate Court.

7001
226 I.A. 649

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present—The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 1 1922

the opinion of

the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

George H. Pacey,

Appellee,

226 I.A. 648

vs.

Appeal from County Court

Block & Kuhl Company,

of Georgia.

Appellant.

Partlow, J.

Appellee, George H. Pacey, began an action of assumpsit in the county court of Peoria county against appellant, Block & Kuhl Company, a corporation, for commission alleged to be due. There was a trial by a jury, verdict for \$644.75, a remittitur of \$74.25, judgment for the balance and this appeal was prosecuted.

Appellant operates a large department store in the city of Peoria. In September, 1916, appellee entered the employ of appellant as a furniture salesman. He was to receive \$28.85 per week and a commission of 4½% on his net sales, less the amount which he received as a weekly salary. The net sales were the total sales less the amount of merchandise sold and later returned; or, if exchanged, less the difference in the exchange value of the goods returned and the goods originally sold. Appellee worked from September 1916 to September 1920. In January, 1917, he received a commission for the time he worked in 1916. On January 1, 1919, the weekly salary was increased to \$35.00. In January of each year up to January 1, 1920, he received commission for each previous year. In January, 1920, a new contract was entered into, the terms of which are in dispute. Appellant contends that at that time appellee was asked how much merchandise he thought he could sell during the year 1920, and he replied that he thought he could sell about \$50,000.00 worth. Appellant claims that appellee was then told that, if he could sell that amount, he would be able to make a nice bonus, and that his salary for the year would be \$35.00 per week, together with a commission of 4½% on all of the merchandise sold by him

during the year in excess of \$40,444.00. Appellee claims that he was told by appellant that his salary would be \$35.00 per week and that his commission would be 4% on his net sales, less his weekly salary, and that nothing was said about the employment being for a year, or about the commission being only on the net sales above \$40,444.00. Both parties admit that in this conversation there was some talk about a written contract, but it is agreed that no written contract was executed. In September, 1920, appellee informed appellant that he was going into business for himself and he wanted to give two weeks' notice of his intention to quit the employment of appellant. He was informed by appellant that if he quit before the end of the year 1920 he would be entitled to no commission. Appellee thereupon left the employment of appellant, and on November 16, 1920, began this suit for commissions which he claims were due from January 1, 1920, to September 8, 1920.

In support of appellee's claim seven exhibits, numbered from 1 to 7, were admitted in evidence. These exhibits were cards upon which appellee kept account of his net daily sales. The evidence shows that each night appellee turned in to the office of appellant an index card which was ruled horizontally and vertically. Each line with its corresponding numbers showed a sale. In case goods were returned, a credit memorandum was made out by appellee and turned over to appellant. Each night a quota card was also turned in to appellant, showing the gross amount of daily sales and credits for goods returned or exchanged. For his own convenience appellee, each night, entered on a card, a balance of net sales computed from the index and quota cards, and at the end of the month he added up these daily amounts so as to ascertain his total net sales for each month. The seven exhibits objected to were these seven monthly cards kept by appellee from January to August inclusive, except the card for April which only showed a total for April and not the net daily

During the year in excess of \$10,000.00. The Commission also
has not been able to determine the exact amount of the
and that his commission would be \$10,000.00. The Commission
his weekly salary, and that salary was about \$10,000.00.
being for a year, or about the commission being about \$10,000.00.
after about \$10,000.00. The Commission also has not been able
action there was some \$10,000.00. The Commission also has not been able
agreed that no action should be taken. The Commission also has not been able
action should be taken. The Commission also has not been able
himself and he wanted to know the reason of his commission.
to quit the employment of the Commission. He was informed by the
that that it be quit before the end of the year. The Commission
be entitled to no commission. The Commission also has not been able
employment of the Commission, and on January 15, 1930, began the
the Commission which is being done over the Commission. The Commission
September 8, 1930.

In support of the Commission's claim of \$10,000.00, the Commission
from 1 to 5, were entitled to the Commission. The Commission also has not been able
could upon which the Commission is in receipt of the Commission. The Commission
the Commission also has not been able to determine the exact amount of the
office of the Commission in the Commission and which was not determined
and the Commission. The Commission also has not been able to determine the exact amount of the
a case. In the Commission's claim of \$10,000.00, the Commission also has not been able
made out by the Commission and which was not determined. The Commission
a gross case was also turned in to the Commission, showing the Commission
amount of the Commission and which was not determined. The Commission
for his own Commission and which was not determined. The Commission
a balance of the Commission and which was not determined. The Commission
and at the end of the month he asked the Commission the Commission
as to ascertain his total net salary for the year. The Commission
existence of the Commission and which was not determined. The Commission
the Commission is being done over the Commission. The Commission
the Commission also has not been able to determine the exact amount of the

sales. These seven cards did not show the gross daily sales or credits, but contained only the net sales. It is contended by appellant that these cards were not books of account and were improperly admitted in evidence. We think no error was committed in admitting these exhibits. The evidence shows that they were made in the usual course of business, were in the handwriting of appellee and were true and correct. He had a right to keep books or records for himself, and the fact that appellant had the same record more in detail did not deprive appellee of the right to keep books for himself, or prevent the books so kept by him from being admitted in evidence. *Chisholm v. Beaman* 160 Ill. 101. The fact that these exhibits did not show total daily sales and credits, but only net daily sales, did not render them incompetent. *Anderson v. Crane*, 183 Ill. App. 21. The evidence showed that the original cards made by appellee and turned over to appellant, showing gross daily sales, had been destroyed, while the cards made by him showing daily credits were still in the possession of appellant. By reason of the destruction of these daily sale cards exhibits 1 to 7 were the only original net sale cards in existence.

We are of the opinion that these exhibits were properly admitted in evidence for the further reason that the statement of the total sales and credits of appellee furnished to appellant each day was in the nature of an account stated. Where one person has a charge against another person and furnishes a statement of account and no objections are made to the statements within a reasonable time, they become accounts stated, and tend to establish an admission by the debtor of the correctness of the account. *Anderson v. Crane*, *supra*. Copies of exhibits 1 to 7, but more in detail, having been delivered to appellant, that fact was competent to go to the jury in connection with exhibits 1 to 7.

Even if these seven exhibits were not books of original entry and were improperly admitted in evidence, appellant was not injured by their admission for the reason that appellant's own

sales. These seven cards did not show the gross daily sales or credits, but contained only the net sales. It is contended by appellant that these cards were not books of account and were improperly admitted in evidence. We think no error was committed in admitting these exhibits. The evidence shows that they were made in the usual course of business, were in the handwriting of appellee and were true and correct. We had ought to keep books or records for himself, and the fact that appellant had the same record more in detail did not deprive appellee of the right to keep books for himself, or prevent the books so kept by him from being admitted in evidence. *Orin v. Bennett*, 100 Ill. 101. The fact that these exhibits did not show total daily sales and credits, but only net daily sales, did not render them incompetent. *Anderson v. Crane*, 125 Ill. App. 22. The evidence showed that the original cards made by appellee and turned over to appellant, showing gross daily sales, had been destroyed, while the cards made by him showing daily credits were still in the possession of appellant. By reason of the destruction of these daily sale cards exhibits 1 to 7 were the only original not sale cards in existence.

We are of the opinion that these exhibits were properly admitted in evidence for the further reason that the statement of the total sales and credits of appellee furnished to appellant each day was in the nature of an account stated. Where one person has a charge against another person and furnishes a statement of account and no objections are made to the statements within a reasonable time, they become accounts stated, and tend to establish an admission by the debtor of the correctness of the account. *Anderson v. Crane*, supra. Copies of exhibits 1 to 7, but more in detail, having been delivered to appellant, that fact was competent to go to the jury in connection with exhibits 1 to 7. Even if these seven exhibits were not books of original entry and were improperly admitted in evidence, appellant was not injured by their admission for the reason that appellant's own

books admitted in evidence as exhibits 98 to 110, showed the gross sales, and the credit cards made by appellee and offered in evidence by appellant show all proper deductions from the gross daily sales and no variance is pointed out between appellant's exhibits 98 to 110 and appellee's exhibits 1 to 7. If there had been any variance appellant was in a position to have pointed it out and, not having done so, we assume there was no variance. If there was no variance then appellant was not injured by the admission of appellee's exhibits 1 to 7 even though they were not books of original entry and were improperly admitted in evidence.

It is next contended that the court improperly restricted the admission of appellant's exhibits 98 to 110 for the purpose of showing gross sales only. These exhibits were the books showing appellee's gross sales and credits as kept by appellant during the employment, and were made up from the cards showing gross sales and credits and turned in to appellant by appellee. It is claimed that they were fully identified as books of original entry and should have been admitted for all purposes without restriction, and that by so restricting their admission, appellant was precluded from questioning appellee's estimate of the amount of merchandise which had been returned and which should have been charged against his gross sales; that appellant attempted to make a special showing of the amount of merchandise returned by offering a number of exhibits of credit memoranda for the return of goods sold by appellees, but the court refused to admit them because they were not in the handwriting of appellee. We do not see how appellant was in any way injured by this limitation. Exhibits 98 to 110 were admitted to show the gross sales, and exhibits 1 to 7 were offered by appellee to show the net sales. The credit cards, showing the credits, were offered in evidence by appellant. Thus the total sales and credits were fully proven by proper evidence. As far as credits were concerned, exhibits 98 to 110 were mere repetitions of the original credits admitted.

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mitted in evidence. It is next contended that the court improperly restricted the admission of appellant's exhibits 98 to 110 for the purpose of showing gross sales only. These exhibits were the books showing appellant's gross sales and credits as kept by appellant during the employment, and were made up from the books showing gross sales and credits and turned in to appellant by appellee. It is claimed that they were truly identified as books of original entry and should have been admitted for all purposes without restriction, and that by so restricting their admission, appellant was prejudiced from questioning appellee's exhibits of the amount of merchandise which had been returned and which should have been charged against his gross sales; that appellant attempted to make a special showing of the amount of merchandise returned by offering a number of exhibits of credit memoranda for the return of goods sold by appellee, but the court was used to admit them because they were not in the possession of appellee. We do not see how appellant was in any way injured by this limitation. Exhibits 98 to 110 were admitted to show the gross sales, and exhibits 1 to 7 were offered by appellee to show the net sales, the credit cards, showing the credits, were offered in evidence by appellant. From the total sales and credits were truly proven by proper evidence. As far as credits were concerned, exhibits 98 to 110 were not in evidence of the original credits admitted

in evidence which were in the handwriting of appellee, and for this reason no injury was occasioned by limiting exhibits 98 to 110 to the gross sales.

The praecipe, summons and declaration claimed damages in the sum of \$500.00, the judgment was for \$570.72 and it is insisted by appellant that the judgment, being in excess of the ad damnum cannot be sustained. The abstract and record filed by appellant showed no amendment of the ad damnum, but an additional record and abstract filed by appellee shows that on March 12, 1921, appellee made a motion to increase the ad damnum in the declaration to \$700.00. The motion was allowed and the amendment was made. The judgment does not exceed the ad damnum in the declaration as amended. No specific objection was made to any variance between the amount of damages as alleged in the declaration and the amount set forth in the praecipe and summons. No specific error having been assigned on that point, it is now too late for appellant to take advantage of any such error, if any existed. *Utter v. Jaffray & Co.* 114 Ill. 470. *The Metropolitan Accident Association v. Proiland*, 131 Ill. 36. *Prairie State Loan & Building Association v. Corrie*, 167 Ill. 414. *Leathe v. Thomas*, 218 Ill. 246.

At the close of the evidence, appellant made a motion to direct a verdict in its favor, the motion was overruled and this ruling is assigned as error. It is also contended that the verdict is contrary to the weight of the evidence. The motion to direct a verdict was based on the claim of appellant that the suit was prematurely brought for the reason that the employment of appellee was for a year and that no commission was due until the end of the year, whereas the suit was commenced on November 16, 1920. The contention that the verdict is contrary to the evidence is based upon the same ground. There is a sharp conflict in the evidence as to the terms of the employment. The evidence offered by appellant tends to show that the employment was for a year, but the evidence offered by appellee is to the

in evidence which were in the handwriting of appellant, and for this reason no inquiry was occasioned by limiting exhibits 22 to 23 to the same series.

The principle, unknown and established, claimed damages in the sum of \$750.00, the judgment was for \$750.00 and is in the nature of a judgment that the defendant, being in possession of the property, cannot be held liable. The evidence and record filed by appellant showed no payment of the judgment, but in addition to the record and exhibits filed by appellee there was a check for \$750.00, 1921, appellee made a motion to increase the judgment in the declaration to \$750.00. The motion was allowed and the judgment was made. The judgment does not exceed the judgment in the declaration as amended. No specific objection was made to any variance between the amount of damages as alleged in the declaration and the amount set forth in the evidence and evidence. The specific error having been assigned on this point, it is now too late for appellant to take advantage of any such error, if any existed. *Utter v. Lafferty*, 200 Ill. 420. 1905.

Metropolitan Life Insurance Co. v. Fidelity, 181 Ill. 30. 1904.
First State Loan & Building Association v. Corrie, 187 Ill. 434. 1904.
Beattie v. Thomas, 218 Ill. 248.

At the close of the evidence, appellant made a motion to direct a verdict in its favor, the motion was overruled and this trial is assigned as error. It is also contended that the verdict is contrary to the weight of the evidence. The motion to direct a verdict was based on the claim of appellant that the suit was prematurely brought for the reason that the employment of appellant was terminated at the end of the year, whereas the suit was commenced on November 16, 1920. The contention that the verdict is contrary to the evidence is based upon the same ground. There is a sharp conflict in the evidence as to the terms of the employment. The evidence offered by appellant tends to show that the employment was for a year, but the evidence offered by appellee is to the

contrary. No good purpose would be served in setting out this evidence in detail. There was some talk between the parties at the time the contract was made of putting the contract into writing, but this appellee refused to do. The word "year" was used during the negotiations and at least one witness for appellant testified that the employment was for a year. Appellant offered evidence to show a custom of appellant to pay all commissions at the end of the year. It has been held that an agreement for a certain sum per year, no term of service being agreed upon, merely governs the rate of compensation and not necessarily the length of the term of the employment. *Stund v. Zimmerman*, 29 Ill. 269; *Chadwick v. Morris Co.*, 170 Ill. App. 569. *Marquam v. Domestic Engineering Co.*, 210 Ill. App. 337. When the terms of a contract are not ambiguous, a custom cannot be invoked to overcome the positive terms of a contract. *Consolidated Water Power Co. v. Louisville Herald Co.*, 211 Ill. App. 369. It is not sufficient to prove isolated instances of a custom, but the transaction must be positively established as a fact and not left as a matter of inference from various transactions. *Jones & Co. v. Bowman Dairy Co.*, 209 Ill. App. 579. Whether a given custom does or does not exist is a question of fact for a jury. *Chicago Packing & Provision Co. vs. Tilton*, 87 Ill. 547. Where there is no specification of any particular time of service agreed upon by contract, there is no hiring for any fixed period. *Odell v. Chicago & Great Western Railroad Company*, 212 Ill. App. 616. What the terms of the contract were between appellant and appellee; whether the employment was for one year; whether the commission was not due until the end of the year; and whether appellee violated the terms of the contract, were all questions of fact for the jury and this court will not disturb the verdict unless it is clearly against the weight of the evidence. We have examined the evidence with considerable care and we cannot say that the verdict was against the weight of the evidence, and we do not think that the court committed any error in refusing to

direct a verdict for appellant.

Complaint is made of certain remarks to the jury made in the argument by counsel for appellee. It will not be necessary to set out those remarks in full for the reason that, from our examination of them, we do not consider they constituted reversible error.

We find no error and the judgment will be affirmed.

Judgment affirmed.

direct a verdict for appellant.

Complaint is made of certain errors to be found in the
the argument of counsel for appellee. It will not be necessary
to set out those remarks in full for the reason that, upon our
examination of them, we do not consider they constituted reversible

We find no error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this— 6th day of
Sept. — in the year of our Lord one thousand
nine hundred and twenty— two

Justus L. Johnson
Clerk of the Appellate Court.



13, 1922

7021

2267.A. 649

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

present—The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 5

the opinion of

the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

George A. Lyon, Trustee in Bankruptcy
of the estate of Josiah L. Robinson,

Appellant,

2261.1

vs.

Josiah L. Robinson, Ada Stone Robinson,
Mutual Wheel Company, a corporation,
Fred J. Kraft, L. G. Willis, as Trustee
in Bankruptcy of the estate of
Robinson-Miller Company, a corporation,
William E. Fry, Trustee in Bankruptcy
of the estate of Robinson Manufacturing
Company, a corporation, H. G. McGee,
executor of the estate of Frank H. Keys,
deceased, Cary R. Crawford, and George
McMaster,

Appellees.

Appeal from
Rock Island

Partlow, J.

On December 24, 1909, appellant, George A. Lyon, as trustee in bankruptcy of Josiah L. Robinson, filed his bill in the circuit court of Rock Island county against appellees, Josiah L. Robinson; Ada Stone Robinson; the Mutual Wheel Company, a corporation; L. G. Willis, as trustee in bankruptcy of the Robinson-Miller Company, a corporation; William E. Fry, trustee in bankruptcy of the Robinson Manufacturing Company, a corporation; H. G. McGee, executor of the estate of Frank H. Keys, deceased; Fred J. Kraft; Cary R. Crawford; and George McMaster, in which appellant sought to set aside certain transfers of stock by Robinson alleged to have been in fraud of creditors. The cause was removed to the United States Court, was subsequently sent back to the State court, and amended and supplemental bills were filed. There were demurrers to the bill, finally issue was joined and the cause was referred to a master to take the evidence and report his conclusions. The master recommended a decree setting aside a part of the transfers, and holding that other transfers were valid. Exceptions to the master's report were sustained, the bill was dismissed for want of equity, and this appeal was prosecuted.

The evidence shows that Josiah L. Robinson, in 1875, in the

George A. Lyon, Trustee in Bankruptcy
of the estate of Josiah L. Robinson;

2231A.041

Appellant,

vs.

George A. Lyon,

Trustee in Bankruptcy

Josiah L. Robinson, late Stone Robinson,
Mutual Wheel Company, a corporation,
Fred T. Kraft, D. G. Williams, as trustees
in Bankruptcy of the estate of
Robinson-Miller Company, a corporation,
William B. Wry, Trustee in Bankruptcy
of the estate of Robinson Manufacturing
Company, a corporation, H. G. McGee,
executor of the estate of Frank E. Kays,
deceased, Cary A. Crawford, and George

Partlow, Jr.

On December 24, 1903, appellant, George A. Lyon, as trustee
in Bankruptcy of Josiah L. Robinson, filed his bill in the district
court of Rock Island county against appellees, Josiah L. Robinson;
Ada Stone Robinson; the Mutual Wheel Company, a corporation; D. G.
Williams, as trustee in Bankruptcy of the Robinson-Miller Company, a
corporation; William B. Wry, trustee in Bankruptcy of the Robinson
Manufacturing Company, a corporation; H. G. McGee, executor of the
estate of Frank E. Kays, deceased; Fred T. Kraft; Cary A. Crawford;
and George Webster, in which appellant sought to set aside certain
transfers of stock by Robinson alleged to have been in fraud of
creditors. The cause was removed to the United States Court, and
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material bills were filed. There were numerous to the bill, finally
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decree setting aside a part of the transfers, and holding that other
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the bill was dismissed for want of equity, and this appeal was pre-

ceded.

The evidence shows that Josiah L. Robinson, in 1875, in the

city of Freeport, formed a co-partnership known as Robinson & Company, for the manufacture of vehicles. The business was successful, and in 1890 was incorporated under the name of the Robinson Manufacturing Company. Two adjunct corporations were organized to take care of the output of the Robinson Manufacturing Company, namely, the Robinson-Miller Company, of Minneapolis, Minnesota, incorporated in 1891 to look after the business in the northwest, and the Consolidated Implement Company, of Kansas City, Missouri, to look after the business of the southwest. Robinson was the leading spirit in all of these corporations. In 1891 or 1892, a number of persons engaged in the manufacture of vehicles and requiring wheels in large quantities, incorporated the Mutual Wheel Company, with headquarters in the city of Moline, Illinois. The object of this corporation was to manufacture wheels, supply the members of the corporation at advantageous prices, and not to let any of the stock get into the hands of outsiders. This last corporation was prosperous, paid large dividends and increased its capital stock from time to time.

Fred J. Kraft, in 1889, entered the employ of the Robinson Manufacturing Company as a traveling salesman, and continued in that position until December, 1900. Robinson and Kraft went to a health resort in Alma, Michigan, where Robinson met Ada Stone, a bookkeeper. She was born in Washington, D. C., she taught school at \$21.00 a month, and had been employed for about five years in the government departments at from \$60.00 to \$75.00 per month, also at Alma, Michigan, for two years and a half at \$30.00 a month, and her room, board and washing. She had saved about \$1800.00. She accepted Robinson's offer of employment, and in 1898 went to Freeport and entered the employ of the Robinson Manufacturing Company. She took with her the \$1800.00 she had saved from her former employment, and testified that she placed it in an envelope in the company's safe, where it remained with other small accumulations. She became a member of the Robinson family, and their relations

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city of Freeport, formed a co-partnership known as Robinson &

became very close and confidential. Her salary at the Robinson Manufacturing Company at first was \$12.50 a week, which was later increased to \$1000.00 per year. Robinson in 1902 made gifts and transfers of money and other property to Ada Stone. When Robinson's mother died she left an estate of about \$4700.00, which was given to Ada Stone. From 1902 to 1904 three insurance policies on Robinson's life matured, and these amounts were paid to her; one was \$760.00, a second was \$2000.00, and the third was \$1560.00. Robinson's wife died in November, 1903, leaving no estate, and in the following year Robinson made a gift of his home and its furnishings to Ada Stone, which property was afterwards sold for \$8000.00. It is claimed that all of these gifts to Ada Stone were returned to Robinson by her to be held by him in trust for her, and they were allowed to accumulate for future investments. In August, 1905, Robinson and Ada Stone were married; and the evidence shows that the fund in the envelope in the safe had increased to about \$3000.00.

Robinson owned 270 shares of stock of the Mutual Wheel Company, with a par value of \$27,000.00, and on March 7, 1906, he made a gift to his wife of 180 of these shares, and certificate No. 87 was issued to her. This certificate was afterwards divided into two certificates, Nos. 113 and 114, and for 90 shares each, issued to Mrs. Robinson. The remaining 90 shares of the 270 standing in the name of Robinson, it is claimed, were owned by the Robinson Manufacturing Company, and held by Robinson as trustee. In the fall of 1906, a stock dividend of 100 per cent was declared, whereby the number of shares of Mrs. Robinson was doubled, making her the owner of 360 shares of the Mutual Wheel Company stock. The 90 shares which Robinson claims he held in trust participated in the stock dividend, and these 180 shares were subsequently hypothecated to the First National Bank of Freeport to secure a debt of the Robinson Manufacturing Company. Later this pledge was divided, the bank taking in pledge 110 shares, and a certificate for 70 shares, numbered 112, was later issued to Kraft on July 2, 1908.

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In 1907, Robinson began to have financial difficulties.

The banks refused to loan his corporation any more money and demanded payment on the notes which were at that time due. Robinson carried the paper of these corporations to a large amount on which he could not realize. When confronted with these difficulties Robinson and his wife determined to invest the trust fund, which Robinson held for his wife, in the stock of the Mutual Wheel Company. The Robinson-Miller Company claimed to hold, through Robinson, as trustee, 90 shares of this stock, being certificate No. 89, and Robinson and wife went to Minneapolis, and, on August 6, 1907, procured a transfer of this certificate to Mrs. Robinson, as certificate No. 106. Most of the purchase price for this stock, it is claimed, was paid in checks by Robinson from the trust fund, which appeared, however, merely as a credit to him on the books of the Robinson-Miller Company. To make up the balance Mrs. Robinson drew on the \$3000.00 envelope in the safe of the Robinson Manufacturing Company. It is claimed by Robinson that this purchase was in fact made early in July, 1907, and on account of the absence of the secretary the new certificate was not issued until August, but the appellant contends that this was merely a subterfuge to avoid the four months provision of the Bankruptcy Act. In writing out the assignment of certificate No. 89, the secretary inserted the name of J. L. Robinson, but his attention was called to that fact, and it was corrected by adding to the assignment the statement that the shares were issued to Ada S. Robinson.

On October 31, 1907, Robinson ordered certificates Nos. 70 and 88 cancelled, and certificate No. 107 for 90 shares, and No. 108 for 70 shares, were issued in their place to Mrs. Robinson. Thus, on October 31, 1907, on the eve of the insolvency of Robinson, his wife became the owner of 610 shares of the stock of the Mutual Wheel Company and its value was \$125.00 a share.

On the afternoon of October 31, 1907, Robinson left Freeport to join Mrs. Robinson in Kansas City. He took with him all of the available funds of these corporations, amounting to about \$4500.00.

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he could not collect.

Robinson and his wife determined to invest the trust fund, which
Robinson held for his wife, in the stock of the Mutual Trust Company.
The Robinson-Miller Company refused to hold, through Robinson, a
trust, 50 shares of this stock, being certificate No. 82, and

Robinson and wife went to Minneapolis, Minn., on August 3, 1907, and
secured a transfer of this certificate to Mrs. Robinson, as certificate
No. 106. Most of the proceeds of this stock, it is said,
was paid in checks by Robinson from the trust fund, which was
however, merely as a credit to him on the books of the Robinson-

Miller Company. He made up the balance due Robinson from the
\$2000.00 advance in the sale of the Robinson-Miller Company.
It is claimed by Robinson that this advance was in fact made only

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Trust Company and its value was \$123.00 a share.

On the afternoon of October 31, 1907, Robinson left his home
to join Mrs. Robinson in Kansas City. He took with him all of the
available funds of these corporations, amounting to about \$2000.00.

He testified that of this amount, he paid \$530.00 on a note due from the Robinson Manufacturing Company to Mrs. Laura Stone, the mother of Mrs. Robinson, and \$2400.00 of the amount was turned over to Mrs. Robinson, and Robinson kept the remaining \$1600.00. In November, 1907, Robinson and wife, in Los Angeles, California, met Kraft, who had severed his connection with the Robinson Manufacturing Company about 1900, and had located in Los Angeles, where he was in the carpenter business. While in the employ of the Robinson Manufacturing Company he received a salary of from \$75.00 to \$125.00 a month, and it is claimed that he acquired certain stock of the corporation, and that when he left its employ it owed him back salary and borrowed money amounting to \$7300.00, and the company's note was issued to him for this amount, but his stock was left in the possession of the company. It is apparent from the evidence that Kraft knew very little, if anything, about this \$7300.00 note or his stock in the company. He left everything to Robinson, who looked after the matter for him, and received the interest. Robinson and wife had the Kraft note of \$7300.00 with them in Los Angeles, and Mrs. Robinson claims she took up this note by giving her own note to Kraft and leaving with him as collateral security certificate 108 for 70 shares of stock. On July 2, 1908, Mrs. Robinson took up her note to Kraft by transferring to him the 70 shares of the Wheel Company's stock, being certificate 112.

On April 10, 1908, Robinson was adjudged a bankrupt in the United States ^{District} Court of Minnesota, and George M. Lyon was appointed as trustee. Robinson was discharged in bankruptcy, on August 4, 1911, over the objections of the Fidelity Trust Company, a creditor. On March 2, 1908, the Robinson-Miller Company was adjudged a bankrupt in the same court, and L. G. Willis was appointed trustee. On February 8, 1908, the Robinson Manufacturing Company was adjudged a bankrupt in the United States District Court for the Western Division of the Northern District of Illinois, and William E. Fry was appointed trustee. On July 1, 1908, a bill was filed in the District Court of the United States for the Northern Division of

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from the Robinson Manufacturing Company to Mrs. James Stone, the
He testified that of this amount, he paid \$250.00 on a note due

the Southern District of Illinois, by George A. Lyon, trustee of Robinson, against Robinson and his wife and the Mutual Wheel Company, Kraft, Willis and Fry, as trustees, which bill alleged the ownership of the 610 shares of the Mutual Wheel Company stock by Robinson, the transfer to Mrs. Robinson, the pledge of the 70 shares to Kraft, and alleged that all of these transactions were fraudulent as to creditors of Robinson, and prayed that the same be vacated and the stock subjected to the payment of Robinson's debts. On October 2, 1908, notice was served on the Mutual Wheel Company, notifying it of the filing of the bill in the United States Court and warning it not to pay dividends to either Robinson or wife, or to Kraft, on the stock in question. On November 23, 1908, Fry, as trustee, filed a cross-bill making, in substance, the same charges as in the original bill, and on October 20, 1909, the bill and cross-bill were dismissed.

On December 24, 1909, appellant, as trustee, filed the bill in this case in the circuit court of Rock Island county against the parties to this suit, making the same charges as alleged in the bill filed in the United States Court, and asking the same relief. On May 2, 1910, Robinson and wife and Kraft had the cause removed to the United States District Court for the Southern District of Illinois, where the suit was subsequently dismissed, was afterwards reinstated, and the cause was finally remanded to the circuit court of Rock Island county. On November 6, 1911, an amended and supplemental bill was filed making Frank H. Keys, Cary R. Crawford and George McMaster defendants, and alleging transfers of stock to them subsequent to the filing of the bill. Keys lived in Iowa, Crawford in Missouri, and McMaster in Illinois. Upon issue being joined in the circuit court of Rock Island county, the cause was referred to the master to take the evidence and report his conclusions.

The master found that the transfer of the 180 shares of stock in March, 1906, was a gift made under such circumstances as to be unassailable, and therefore it and its increase to 360 shares

the Southern District of Illinois, by George A. Brown, trustee of
Robinson, against Robinson and his wife and his personal assets
the ownership of the 610 shares of the Illinois Local Gas Company stock
by Robinson, the transfer to Mrs. Robinson, the assignor of the 610
shares to Mrs. Robinson, and alleged that all of these transactions were
transferrable as to creditors of Robinson, and argued that the same
be vacated and the stock registered to the payment of Robinson's
debts. On October 2, 1908, notice was served on the Illinois Local
Company, notifying it of the filing of the bill and the United
States Court and warning it not to pay dividends on either Robin-
son or wife, or to Mrs. Robinson, on the stock in question. On November
25, 1908, Mrs. Robinson, filed a cross-bill seeking, in substance,
the same changes as in the original bill, and on October 30, 1909,
the bill and cross-bill were dismissed.
On December 22, 1909, respondent, as trustee, filed the bill
in this case in the circuit court of Rock Island county seeking
the parties to this suit, asking the same changes as alleged in the
bill filed in the United States Court, and seeking the same relief.
On May 2, 1910, Robinson and wife and Mrs. Robinson had the same removed
to the United States District Court for the Southern District of
Illinois, where the bill was subsequently dismissed, was afterwards
reinstated, and the cause was finally remanded to the circuit court
of Rock Island county. On November 2, 1911, an amended and supple-
mental bill was filed making Frank H. Kays, Gary R. Crawford and
George Webster defendants, and alleging transfers of stock to
them subsequent to the filing of the bill. Kays lived in Iowa,
Crawford in Missouri, and Webster in Illinois. Upon issue being
joined in the circuit court of Rock Island county, the cause was
referred to the master to take the evidence and report his con-

The master found that the transfer of the 180 shares of
stock in March, 1908, was a gift made under such circumstances as
to be irrevocable, and therefore it and its income to 300 shares

in October, 1906, were out of the case; that the transfer of 250 shares in August and October, 1907, were paid for by Robinson, were transferred to Mrs. Robinson without consideration in order to place them out of the reach of his creditors, and were not paid for out of any trust fund belonging to Mrs. Robinson; that the transfers to Keys, Crawford and McMaster were in good faith, the doctrine of lis pendens did not apply to them, they did not have any notice and were not charged with knowledge of any improper intent in the transfer, and the bill was dismissed as to them. On June 10, 1909, the master overruled the objections to this report, except those referring to the prayer for an accounting from Mrs. Robinson, and as to these objections the master modified his report and found that the appellant was entitled, under the bill, to an accounting from Mrs. Robinson.

On the hearing of exceptions to the master's report, the exceptions were sustained and the court found that Crawford, Keys, and McMaster were bona fide purchasers and the bill should be dismissed as to them; that no decree for an accounting could be entered against Robinson, his wife or Kraft, for the reason that all of them were served by publication, and the court was without jurisdiction to render a personal decree against them; that the appellant was not a judgment creditor of Robinson, with execution unsatisfied, and was not entitled to a discovery of property in the hands of a third person; that the cause could not be retained against the Mutual Wheel Company and Crawford, Keys and McMaster, and the ~~bill~~ bill was dismissed for want of equity.

The contention of the appellant is that the gift in March, 1906, was colorable only, and Robinson continued thereafter to have control and a beneficial interest in the stock; that the transfer of August, 1907, by Robinson-Miller Company, was paid for by Robinson and vested the equitable and legal title in him, and the stock was re-issued to his wife without consideration for the purpose of delaying and defrauding creditors; that the transfer in October, 1907, was without consideration and void as to creditors, and

in October, 1900, were out of the case; that the retention of the
same in August and October, 1900, was not in violation of the
were transferred to Mrs. Robinson without objection in order
to place them out of the way of the creditors, and were not paid
for out of any trust fund belonging to Mrs. Robinson; that the
transfers to Lloyd, Brewster and Webster were in good faith, and
acquiescence of his creditors did not amount to fraud, that he did not give
any notice and was not charged with knowledge of any irregular
intent in the transfer, and the bill was dismissed as to them.
On June 10, 1900, the master overruled the objections to this report,
except those relating to the proper way in disposing of the same.
Robinson, and as to these objections the master modified his report,
and found that the appellant was satisfied, under the bill, to be

On the hearing of exceptions to the master's report, the
exceptions were sustained and the court found that Webster, Lloyd,
and Webster were bona fide purchasers and the bill should be
dismissed as to them; that no decree for an accounting could be
entered against Robinson, his wife or child, for the reason that
all of them were exempt by publication, and the court was without
jurisdiction to render a personal decree against them; that the
appellant was not a creditor of Robinson, with knowledge
of the same, and was not entitled to a discovery of property in
the hands of a third person; that the same could not be returned
against the Mutual Trust Company and Brewster, Lloyd and Webster,
and the bill was dismissed for want of equity.

The contention of the appellant is that the bill in equity,
1900, was defective only, and Robinson continued thereafter to have
control and a beneficial interest in the stock; that the transfer
of August, 1900, by Robinson-Miller Company, was paid for by Robinson
and vested the equitable and legal title in him, and the stock was
re-issued to him with without consideration for the purpose of
delaying and defrauding creditors; that the transfer in October,
1900, was without consideration and void as to creditors, and

whatever interest the Robinson Manufacturing Company had was extinguished by that transfer; that Keys, Crawford and McMaster were not innocent purchasers, but, if they were held to be innocent purchasers, Mrs. Robinson must account from the shares retained by her for all shares transferred by her to them, there being no identity in the shares of stock; and if there were no shares retained by her, then she must account for their value.

The contention of appellee is that the appellant had no legal right to institute the suit, and it was commenced without any lien, judgment or execution; that the appellant is estopped by the objections of the Fidelity Trust Company before the bankruptcy court, to the discharge of Robinson, and the question of the alleged fraud is res judicata; that appellant cannot have a decree in personam against Mrs. Robinson; that the Fidelity Trust Company was the only creditor and was not a creditor of Robinson at the time of the transfer of the stock, and therefore appellant is in no position to attack the transfers; that the appellant cannot have a decree in rem because the res never was within the jurisdiction of the court, or if it ever was, it passed to bona fide holders for value; that as there was no transfer of the stock within four months of the adjudication in bankruptcy, the appellant can have no relief for the reason that the stock transferred passed into the hands of innocent holders for value, and by the terms of the Bankruptcy Act these purchasers are protected; that the bill was to remove clouds and set aside transfers of personal property, and a court of equity was without jurisdiction, but the remedy was at law; that the court never had jurisdiction either of the res, or the person of Mrs. Robinson; that a transfer to be avoided by creditors must be made at a time when the transferor was indebted to the creditors; that a gift inter vivos by a husband to a wife is valid against creditors if the husband is solvent when he made the gift, and no creditor can avoid such a gift unless he was a creditor at the time of the gift, unless the gift was made in anticipation of the debts.

whatever interest the Robinson Manufacturing Company had was extinguished by that transfer; that logo, trademark and label were not innocent purchasers, but, if they were held to be innocent purchasers, Mrs. Robinson must account from the money received by her for all shares transferred by her to them, there being no identity in the names of stock; and if there were no shares received by her, then she must account for their value.

The contention of the plaintiff is that the defendant had no legal right to institute the suit, and it was unnecessary without any issue, judgment or execution; that the defendant is estopped by the objections of the plaintiff to the transfer of the stock, to the discharge of the debt, and the question of the alleged fraud is not presented; that plaintiff cannot have a decree in its favor against the defendant; and the plaintiff's claim is

was the only creditor and was not a creditor of Robinson as the time of the transfer of the stock, and therefore plaintiff is in no position to attack the transfer; that the plaintiff cannot have a decree in its favor because the case never was within the jurisdiction of the court, or if it ever was, it passed to some other holder for value; that as there was no transfer of the stock within four months of the registration in bankruptcy, the plaintiff can have no relief for the reason that the stock transferred passed into the hands of innocent holders for value, and by the terms of the bankruptcy act these purchasers are protected; that the bill was to remove claims and set aside transfers of personal property, and

court of equity was without jurisdiction, but the remedy was to say that the court never had jurisdiction either of the case, or the person of Mrs. Robinson; that a transfer to be avoided by creditors must be made at a time when the transferor was indebted to the creditors; that a gift inure to a husband to a wife in value against creditors if the husband is solvent when he made the gift, and no creditor can avoid such a gift unless he was a creditor at the time of the gift, unless the gift was made in contemplation

Section 67 E, of the Bankruptcy Act of 1898, provides that all transfers with intent to hinder or delay creditors within four months prior to the filing of the bankruptcy petition, shall be void, and that all property so transferred shall pass to the trustee, and it shall be the duty of the trustee to recover the same by legal proceedings. Section 70 E, provides that the trustee may avoid any transfer which any creditor might have avoided, and may recover the property so transferred. Loveland on Bankruptcy, 3rd edition, 1269-1272. The right and duty of the trustee, without prior leave of court, to bring an action for such recovery has been recognized. Loveland on Bankruptcy, 3rd edition, 424.

Under these sections it was not only the right but it was the duty of the appellant, as trustee of Robinson, to file the bill in this case for the purpose of subjecting the property of the bankrupt to the payment of his debts, and leave of court was not necessary before such suit was filed. The bill was filed, not for the benefit of the Fidelity Trust Company alone, but it was filed for the benefit of all creditors, and it made no difference that the Fidelity Trust Company, employed attorneys to assist in the prosecution of the case, and has been more active than other creditors in pushing the case to a conclusion. The fact remains that the Fidelity Trust Company is not the real and sole complainant, but the suit was brought for the benefit of all creditors, and they share in the result of the suit according to the amount of their claims.

Neither is it true, as claimed by appellee, that because the Fidelity Trust Company filed objections to the final discharge in bankruptcy of Robinson on substantially the same grounds as are alleged in the bill, and the United States Court denied the objections and discharged Robinson, that the alleged fraud of Robinson in transferring the stock is res judicata. The most of appellees' argument on this point, as it is on several other points in this case, is that the Fidelity Trust Company was the only creditor of the bankrupt. We do not think the evidence

points in this case, is that the Whittier Trust Company was the
appellees' argument on this point, as it is on several other
points in transferring the stock to her husband. The next of
testimony and discredited Robinson, that the alleged trust of Robin-
son in the bill, and the United States Court during the 19-
in bankruptcy of Robinson on substantially the same grounds as was
the Whittier Trust Company filed objections to the third discharge
Neither is it true, as claimed by appellee, that because

sustains this contention. The bankruptcy proceedings show that five claims were proven against the estate of Robinson, three by the petitioning creditors, one by the Western Trust and Savings Bank of Chicago, and one by the Third National Bank of Rockford, Illinois. It has been held in many cases that the discharge of a bankrupt is personal to him and does not effect a suit for the recovery of fraudulently transferred assets. *Meyer vs. Dewey*, 103 U.S. 301; *In re Pierce*, 103 Fed. 64; *In re Burton*, 29 Fed. 637. The reason for this rule is that otherwise one creditor, by objecting to the discharge of the bankrupt, could defeat the claims of the trustee, though the latter was not a party to the contest over the discharge, and one creditor might defeat the claims of all other creditors, regardless of the merits of the controversy. In this case all of the creditors did not file objections to the discharge, and the trustee took no part in the proceedings, and therefore the order of the United States Court was not res judicata as against the trustee.

There is no merit in the contention of the appellees that the Fidelity Trust Company was not a creditor of Robinson at the time of the transfer of the stock, and that appellant cannot attack the transfer, or that appellant cannot recover because he had no judgment against Robinson, upon which an execution could be issued and returned no property found. 160 shares of the stock were transferred to Mrs. Robinson on October 31, 1907, after the Fidelity Trust Company became a creditor; and before all of the transfers of 1907, the Third National Bank and the Union National Bank were creditors and had been creditors for considerable time. This contention of the appellees cannot be sustained for another reason. This is not a creditors' bill filed by a judgment creditor to subject the real estate to the lien of his judgment, but it is a bill by a trustee in bankruptcy for the purpose of reducing to possession the assets of the bankrupt. It is not a prerequisite to the filing of such a bill that an execution should have been issued upon a judgment secured by the creditor of the bankrupt. After the

sustains this contention. The bankruptcy proceedings show that five claims were proven against the estate of Robinson, three by the petitioning creditors, one by the Eastern Trust and Savings Bank of Chicago, and one by the Third National Bank of Rockford, Illinois. It has been held in many cases that the discharge of a bankrupt is personal to him and does not affect a valid lien or recovery of fraudulently transferred assets. *Boyer vs. Boyer*, 103 U.S. 801; *In re Harbo*, 103 Fed. 84; *In re Boston*, 22 Fed. 637. The reason for this rule is that otherwise one creditor, by objecting to the discharge of the bankrupt, could defeat the claims of the trustee, though the latter was not a party to the contest over the discharge, and one creditor might defeat the claims of all other creditors, regardless of the merits of the controversy. In this case all of the creditors did not file objections to the discharge, and the trustee took no part in the proceedings, and therefore the order of the United States Court was not res judicata as against the trustee.

There is no merit in the contention of the appellees that the Liberty Trust Company was not a creditor of Robinson at the time of the transfer of the stock, and that appellant cannot attack the transfer, or that appellant cannot recover because he had no judgment against Robinson, upon which an execution could be issued and returned no property found. 100 shares of the stock were transferred to Mrs. Robinson on October 25, 1907, after the Liberty Trust Company became a creditor; and before all of the transfers of 1907, the Third National Bank and the Union National Bank were creditors and had judgments against Robinson. The discharge of the bankrupt cannot be asserted to prevent recovery. This is not a creditors' bill filed by a judgment creditor to subject the real estate to the lien of his judgment, but it is a bill by a trustee in bankruptcy for the purpose of reducing to possession the assets of the bankrupt. It is not a proceeding to the filing of such a bill that an execution should have been issued upon a

adjudication of the bankrupt no creditor could reduce his claim to judgment, nor would he be permitted to sue out an execution and levy the same upon any part of the estate of the bankrupt. For these reasons, the ordinary rule with reference to the issuance of an execution before the filing of a creditors' bill does not apply in this case. *McKey vs. Emanuel*, 263 Ill. 276. The transfers which the master found should be set aside were made within four months of the bankruptcy proceeding and under the statute were void if made to defraud creditors.

The next question is with reference to the jurisdiction which the court acquired over Mrs. Robinson. Robinson and wife, Kraft, Crawford and Keys were all residents of foreign States, and the service on each was by publication. There was personal service as to McMaster. Robinson and Kraft did not appear, but all of the other defendants filed demurrers and answers. Mrs. Robinson entered a special appearance and filed a plea to the jurisdiction, which plea was overruled, and all of the defendants were ruled to answer. Thereupon, her solicitor formally entered an appearance "in pursuance of the rule and order of the court" and "for the purpose of making such answer as may be necessary under such rule". On the same day she filed a general demurrer which was filed "only in pursuance of the rule". Thereafter an amended bill was filed and she filed a general demurrer "only in pursuance of the rule". A second amended bill was filed and she again demurred, and later filed an answer to the merits, putting in issue substantially all of the allegations of the bill. The cause was referred to a master, exhaustive hearings were held, depositions were taken in many places, and Mrs. Robinson appeared by attorney and took part in the proceedings. The merits of the case were presented, argued on both sides, and submitted to the court and to the master. It has been held in many cases that, under the circumstances here presented, a defendant submits herself to the complete jurisdiction of the court for all purposes the same as if she had been regularly served with summons as provided by law.

Lahner vs. Hertzog, 23 Ill. App. 308; Rosenbleet vs. Rosenbleet, 122 Ill. App. 408. In Nicholas vs. The People, 165 Ill. 502, on page 503 it was said: "The notice published was so defective that the court acquired no jurisdiction by virtue of it, since the land could not be identified from the description, (Pickering vs. Toxar, 120 Ill. 289), and if appellant did not submit to the jurisdiction of the court, such jurisdiction would not be acquired by an amendment of the notice. The case of People vs. Green, 158 Ill. 594, was where there was a general appearance by the defendants, and the court had jurisdiction. Appellant had a right to appear specially and question the sufficiency of the notice to confer jurisdiction, and if he went no further the court would have no right to render a judgment. But a defendant may enter his appearance in a tax case as well as in a personal action against him, and if the appearance of appellant was general, it made no difference whether the notice published was defective or not. (People vs. Sherman, 83 Ill. 165; Hale vs. People, 87 id. 72; Mix vs. People, 106 id. 425; People vs. Dragstran, 100 id. 286.) A special appearance must be for the purpose of using jurisdictional objections only, and it must be confined to a denial of jurisdiction. An appearance for any other purpose than to question the jurisdiction of the court is general. (2 Ency. of Pl. and Pr. 632, Abbott vs. Semple, 25 Ill. 107; McNab vs. Bennett, 66 id. 157; Crull vs. Keener, 18 id. 65.) In Crull vs. Keener, supra, it was said (p. 66): 'There are cases where the defendant may make a quasi appearance for the purpose of objecting to the manner in which he is brought before the court, and in fact to show that he is not legally there at all, but if he ever appears to the merits he submits himself completely to the jurisdiction of the court and must abide the consequences.' If he appears to the merits no statement that he does not will avail him, and if he makes a defense which can only be sustained by an exercise of jurisdiction, the appearance is general, whether it is in terms limited to a special purpose or not. 2 Ency. of Pl. and Pr. 625." To the same effect is People vs. Smith, 281 Ill. 536. We hold that under the

Lanner vs. Lanner, 28 Ill. App. 303; Lanner vs. Lanner, 182 Ill. App. 408. In Lanner vs. The People, 185 Ill. 303, on page 303 it was said: "The notice published was no effective one, the court required no jurisdiction by virtue of it, since the same would not be identical with the description, (Lanner vs. Lanner, 185 Ill. 303), and it appellant did not submit to the jurisdiction of the court, such jurisdiction would not be acquired by an assignment of the notice. The case of People vs. Lanner, 185 Ill. 303, was where there was a general appearance by the defendant, and the court had jurisdiction. Appellant had a right to appear voluntarily and question the sufficiency of the notice to confer jurisdiction, and if he went no further the court would have no right to render a judgment. But a defendant may enter his appearance in a case as well as in a personal action against him, and if the appearance of appellant was general, it made no difference whether the notice published was defective or not." (People vs. Lanner, 185 Ill. 303; Lanner vs. People, 87 Ill. 45; Lanner vs. People, 100 Ill. 444; Lanner vs. Lanner, 100 Ill. 303.) A special appearance must be for the purpose of raising jurisdictional objections only, and it must be confined to a denial of jurisdiction. An appearance for any other purpose then to question the jurisdiction of the court is general. (Lanner vs. Lanner, 185 Ill. 303; Lanner vs. Lanner, 185 Ill. 303; Lanner vs. Lanner, 185 Ill. 303.) "There are cases where the defendant may make a special appearance for the purpose of objecting to the manner in which he is brought before the court, and in that case that he is not legally there at all, but if he ever appears to the merits he submits himself completely to the jurisdiction of the court and must abide the consequences." If he appears to the merits no statement that he does not will avail him, and if he makes a statement that he does not will avail him. The appearance is general, whether it is in terms limited to a special purpose or not. Lanner vs. Lanner, 185 Ill. 303. To the same effect is People vs. Smith, 281 Ill. 328. We hold that under the

facts here presented the court had complete jurisdiction over Mrs. Robinson the same as if she had been personally served with process as provided by law, with full power and jurisdiction, if justified under the pleadings and proof, to set aside the transfers, to require her to account, to render a personal judgment against her, or to do any other thing necessary to be done by a court of equity under the pleadings and evidence presented.

It is contended by the appellees that Mrs. Robinson could not be compelled to account, because there was no such relief prayed for in the bill. The prayer of the bill, among other things, was "That the defendants be directed to hold such of the stock above set out as has been transferred to each, in trust for your orator, and be ordered and required to account for and turn over said stock to your orator, together with all dividends and profits received by them therefrom". Under this prayer an accounting could be required, if necessary.

There is another reason why the dismissal as to Mrs. Robinson was erroneous, even if a personal judgment could not be rendered against her. The record shows there was standing in her name at the time the bill was filed, stock in the Mutual Wheel Company which was the subject of the litigation. Part had been transferred to Crawford, Keys and Monister, but a part was still held by her. The situs of this stock was in Illinois. *Fahrig vs. Milwaukee and Chicago Breweries*, 115 Ill. App. 525. This stock was the basis of the original service by publication, and that service alone, regardless of any appearance, gave the court jurisdiction to hold and dispose of the stock in any way justified by the pleadings and the evidence. So long as any of that stock remained subject to the jurisdiction of the court the bill should not have been dismissed. The master found the 1906 transfer was not subject to attack, and that the 1907 transfers were fraudulent. Under this holding, Mrs. Robinson, in December, 1907, held 360 shares of stock belonging to her, and 250 shares fraudulently transferred to her by her husband. Any transfer from her will be presumed to be from her own stock and

...the fact that the bill was introduced in the House of Representatives on March 1, 1907, and passed by a vote of 219 yeas to 191 nays. The bill was then sent to the Senate, where it was introduced on March 1, 1907, and passed by a vote of 65 yeas to 35 nays. The bill was then sent back to the House, where it was passed again on March 1, 1907, and then sent to the President for his signature. The President signed the bill on March 1, 1907, and it became law.

It is contended by the appellants that the bill was not passed by the House of Representatives on March 1, 1907, but that it was passed on March 2, 1907. The appellees contend that the bill was passed on March 1, 1907, and that the appellants' contention is without merit. The record shows that the bill was passed by the House of Representatives on March 1, 1907, and that the appellants' contention is without merit.

There is another reason why the bill was passed on March 1, 1907, and not on March 2, 1907. The record shows that the bill was passed by the House of Representatives on March 1, 1907, and that the appellants' contention is without merit. The record shows that the bill was passed by the House of Representatives on March 1, 1907, and that the appellants' contention is without merit.

of the original bill, and that the bill was passed on March 1, 1907, and not on March 2, 1907. The record shows that the bill was passed by the House of Representatives on March 1, 1907, and that the appellants' contention is without merit. The record shows that the bill was passed by the House of Representatives on March 1, 1907, and that the appellants' contention is without merit.

not from the stock held under a constructive trust for the benefit of creditors. *Pyfer vs. Wales*, 36 Ill. App. 446; *Clenmar vs. Drivers' National Bank*, 157 Ill. 206. Even though the certificates for the 310 shares transferred to Crawford, Keys and McMaster included all of the stock issued to Mrs. Robinson in 1907, nevertheless the law does not recognize the identity of shares, but, on the contrary, treats the transfer as covering the stock right-fully owned.

As to the transfer of stock, the evidence shows that Robinson was the organizer of all of these corporations. He was a man of ability and foresight. He was the moving spirit in each of these corporations. As a result of their prosperity, Robinson became wealthy. Apparently there was no financial difficulty until 1907, when all of the corporations except the Mutual Wheel Company became financially embarrassed. To save them from bankruptcy Robinson pledged his financial credit. This act of Robinson did not avert the crash. Robinson saw that the corporations were doomed and he attempted to save a part of his property. In March, 1906, he owned 270 shares of the Mutual Wheel Company, and in that month he transferred 180 of these shares to his wife. The master found this transfer was not in fraud of creditors, and we think this finding is supported by the evidence. In the first place, it was not made within four months of the bankruptcy of Robinson, and therefore does not come within section 67 E of the Bankruptcy Act. The evidence fails to show that on the date of the transfer Robinson was insolvent., but on the contrary it tends very strongly to show that he was in fact solvent, but that conditions had arisen which might place the corporations in financial difficulty. It is apparent this transfer was a gift to his wife and was made without any consideration. If Robinson was solvent at the date of the transfer, and it was not made in fraud of creditors, then Robinson was at liberty to sell and dispose of his property in any manner he might see fit, and no one could complain.

not from the stock held under a certificate given for the benefit
of creditors. After Mr. Bates, 40 Ill. App. 448; Brown v.
Brown, National Bank, 107 Ill. 206. Even though the certificate
for the 250 shares transferred to Crawford, Kate and Webster
included all of the stock issued to Mrs. Robinson in 1907, never-
theless the law does not require the identity of shares, but
on the contrary, treats the transfer as covering the stock right-
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Company became financially embarrassed. He gave them their prop-
erty Robinson pledged his financial credit. This act of Robinson
did not save the group. Robinson saw that the corporations were
doomed and he attempted to save a part of his property. In March,
1908, he owned 250 shares of the Mutual Wheel Company, and in
that month he transferred 150 of these shares to his wife. The
master found this transfer was not in fraud of creditors, and we
think this finding is supported by the evidence. In the first
place, it was not made within four months of the bankruptcy of
Robinson, and therefore does not come within section 67 of the
Bankruptcy Act. The evidence fails to show that on the date of
the transfer Robinson was insolvent, but on the contrary it tends
very strongly to show that he was in fact solvent, but that con-
ditions had arisen which might place the corporations in financial
difficulty. It is apparent this transfer was a gift to his wife
and was made without any consideration. If Robinson was solvent
at the date of the transfer, and it was not made in fraud of
creditors, then Robinson was at liberty to sell and dispose of his
property as he saw fit, and no creditor could

He could sell or give it to his wife and she would acquire the absolute title thereto. *Schuberth vs. Schillo*, 177 Ill. 346; *Vietor vs. Swisky*, 200 Ill. 257; *Torrey vs. Dickinson*, 213 Ill. 36; *Riggin vs. Meek*, 203 Ill. App. 87. For these reasons, we agree with the master that the evidence was not sufficient to set aside the transfer in 1906.

On August 20, 1907, the Robinson-Miller Company endorsed a certificate of 90 shares to Robinson. He at once endorsed it to his wife and the certificate was re-issued to her. On October 31, 1907, 160 shares standing Robinson's name were assigned to Mrs. Robinson. About November 1, 1907, Robinson and wife left for California, taking with them certificates for 610 shares, and practically all of the available cash of the Robinson Manufacturing Company. On November 26, 1907, a petition in bankruptcy was filed against Robinson, resulting in an adjudication. The testimony of Robinson was that the stock transferred in August, 1907, was the property of the Robinson-Miller Company; that it was purchased prior to July 26, 1907, by Robinson for his wife, and paid for by a credit accumulated in his account with that company out of the trust fund held by Robinson for his wife, with the addition of about \$3000.00 paid into the account by her from an envelope kept in the same. The account showed several credits in June and July, and a charge of \$9000.00 against it which was identified as the alleged payment. The 160 shares transferred in October, 1907, it is claimed by Robinson, belonged to the Robinson Manufacturing Company until the summer of 1907, and that it was held in the name of Robinson because the corporation could not hold stock in another corporation, and that 90 shares of this stock were transferred to Mrs. Robinson and paid for by a credit accumulation in Robinson's account out of the trust fund. After considering all of this evidence we are of the opinion that the contention of Robinson that this stock did not belong to him but belonged to the corporation is not sustained by the evidence, but

on the other hand the evidence amply sustains the contention that all of this stock transferred in August and October, 1907, was the property of Robinson and was conveyed for the purpose of defrauding his creditors. Counsel for Mrs. Robinson urge, with considerable earnestness, that these two transfers were legitimate; that they were based upon a valuable consideration and were not in fraud of creditors. In support of this contention they recite the evidence relative to the trust fund in the hands of Robinson belonging to his wife which had been accumulated throughout all the years by the various gifts above recited from Robinson to his wife, also the accumulation of the fund in the safe which was started with the \$1800.00 which she brought with her from Michigan, and which had gradually increased until it amounted to about \$3000.00 in 1907. We are unable to share counsel's confidence in this contention, but on the contrary we are inclined to believe that this story strongly tends to support the contention of appellant that the transfers of 1907 were fraudulent. No good purpose would be served in expressing, in detail, our views on this feature of the case, but we deem it sufficient to say that the accumulation of these two funds was so unusual and so contrary to ordinary business methods that it is ~~is~~ hard to believe they were actually accumulated as appellees contend. On the whole we think the evidence shows that Robinson's companies, except the Mutual Wheel Company, were getting into straightened circumstances as early as the spring of 1907, and the conditions gradually grew worse until they culminated in the disaster of the late fall, and during all of this time Robinson transferred practically all of his assets to his wife without any consideration; that after the transfers to his wife, Robinson continued to control and manage the stock transferred, and received the dividends thereon as late as the spring of 1908. For these reasons, the transfers of August and October, 1907, were fraudulent as to creditors, and the master was correct in so finding.

on the other hand the evidence simply establishes the connection between all of this stock transferred in August and October, 1907, and the property of Robinson and was conveyed for the purpose of transferring his creditors. Counsel for Mrs. Robinson says, with considerable emphasis, that these two transfers were legitimate; that they were based upon a valuable consideration and were not in fraud of creditors. In support of this contention they produce the evidence relative to the trust fund in the hands of Robinson pertaining to his wife which had been secured and transferred all the years by the various agents who resided from Robinson to his wife, also the accumulation of the fund in the bank which was secured with the \$1800.00 which she brought with her from Michigan, and which had gradually increased until it amounted to about \$1000.00 in 1907. We are unable to share counsel's confidence in this contention, but on the contrary we are inclined to believe that this story strongly tends to support the contention of appellant that the transfers of 1907 were fraudulent. No good purpose would be served in explaining, in detail, our views on this matter of the case, but we deem it sufficient to say that the accumulation of these two funds was so unusual and so contrary to ordinary business methods that it has been to believe they were actually accumulated as applied content. On the whole we think the evidence shows that Robinson's companies, except the Mutual Life Company, were getting into financial straits and were nearly as the spring of 1907, and the conditions gradually grew worse until they culminated in the disaster of the late fall, and finally all of this time Robinson transferred practically all of his assets to his wife without any consideration; that within the transfers to his wife, Robinson continued to control and manage the stock transferred, and received the dividends thereon as late as the spring of 1908. For these reasons, the transfers of August and October, 1907, were fraudulent as to creditors, and the master

When Robinson and wife arrived in California they had in their possession 610 shares of the stock of the Mutual Wheel Company. In November, 1907, Mrs. Robinson assigned 70 shares to Kraft. In July, 1908, a new certificate was issued to him, and in July, 1909, he assigned this certificate to Keys and it was transferred to the latter. In May, 1910, Mrs. Robinson transferred 80 shares to Keys and 160 shares to Crawford. Crawford later gave an option for 80 of these shares to McMaster, which option was exercised by McMaster in December, 1910, immediately after the dismissal of the case in the United States Court but before it was reinstated. This made a total of 310 shares transferred by Mrs. Robinson, and left her as the owner of 300 shares. Kraft was served by publication. He did not appear, no personal decree could be entered against him, and his stock had been transferred to Keys and nothing remained in his hands. Keys and Crawford were served with publication, and appeared and answered the bill. The master found that the transfers to Keys, McMaster and Crawford were not made lis pendens, but were made for a valuable consideration, and were not fraudulent. This finding of the master is not seriously controverted as to Keys and Crawford, but it is controverted as to McMaster. The evidence shows that Keys and McMaster were directors of the company, and McMaster was the secretary. Moon, who was Crawford's business associate, was also a director of the company. There was evidence tending to show that all three of these appellees were friends of Robinson, had been closely associated with him in business, knew of the various transfers of stock, and of the suits which had been filed for the purpose of setting aside some of these transfers. There are suspicious circumstances in evidence with reference to the transfers of this stock to these three appellees, but the most that can be said under the evidence is that Keys, Crawford and McMaster were purchasers from one holding under a fraudulent transfer. A purchaser from a person holding under a fraudulent conveyance is not affected by such fraud unless he had notice of the fraud. Section 5, chapter 59, of the statute;

When Robinson and wife arrived in California, they had in their possession 300 shares of the stock of the company. In November, 1907, Mrs. Robinson assigned 75 shares to her. In July, 1908, a new certificate was issued to her, and in July, 1909, he assigned this certificate to her, and it was transferred to the latter. In May, 1910, Mrs. Robinson transferred 80 shares to Keys and 150 shares to Crawford. Crawford later gave an option for 80 of these shares to Webster, which option was exercised in January, 1911, and the shares were transferred to him. This made a total of 330 shares transferred by Mrs. Robinson, and left her as the owner of 300 shares. That was covered by subscription. He did not expect to receive a dividend equal to what he received against him, and his stock had been transferred to Keys and nothing remained in his hands. Keys was indebted to her for the subscription, and received and returned the bill. The transfer found that the transfer to Keys, Webster and Crawford were not made like ordinary transfers, but were made like transfers of stock, and were not fraudulent. This finding of the court is not seriously controverted as to Keys and Crawford, but it is controverted as to Webster. The evidence shows that Mrs. Robinson was a director of the company, and Webster was the secretary. Moon, who was Crawford's business associate, was also a director of the company. There was evidence tended to show that all three of these appellants were friends of Robinson, and had been closely associated with him in business, knew of the various transfers of stock, and of the suits which had been filed for the purpose of setting aside some of these transfers. There are numerous circumstances in evidence with reference to the transfers of this stock to Keys and Crawford, but the most that can be said under the evidence is that Mrs. Robinson was the owner of the stock, and that she transferred it to them one by one.

Spicer vs. Robinson, 73 Ill. 519; Gavagan vs. Bryant, 83 Ill. 376; Bradley vs. Luce, 99 Ill. 234; Sick vs. Guebert, 142 Ill. 154. To justify a court in setting aside a transfer for fraud there must be an attempt by both parties to the transaction to practice the fraud. There is no proof in this record of this essential element. Shin vs. Shin, 91 Ill. 477; Nott vs. Shutts, 87 Ill. App. 341. These parties testified positively that they paid full value for this stock, and that they did not purchase it for the purpose of defrauding creditors of Robinson. The evidence shows that these three appellees were interested in the Mutual Wheel Company before the bankruptcy proceedings, and for that reason they probably would want to buy the stock and keep it in their own hands. If the stock was really the property of Mrs. Robinson, there is no reason apparent, from the evidence, why she would part with it to these three appellees unless they did pay full value for it. We think the evidence fails to justify holding them liable for the stock obtained by them. Counsel for appellees very earnestly insist that the transfer from Mrs. Robinson to Kraft was for a valuable consideration and was not fraudulent. We are not impressed with appellees position on this question. We are more inclined to think the evidence sustains the contention of appellant ~~and~~ that such transfer was in fraud of creditors.

We are of the opinion that the chancellor was in error in sustaining the exceptions to the master's report and dismissing the bill for want of equity. Therefore, the decree will be reversed and the cause will be remanded with directions to over-rule the exceptions to the master's report, to enter a decree in conformity with the master's report, and to refer the cause to the master, if necessary, to state an account, charging Mrs. Robinson with the value of the property which she received as the result of the transfers of August and October, 1907, as found by the master.

Reversed and remanded with directions.

Robinson vs. Robinson, 73 Ill. 219; Gordon vs. Bryant, 22 Ill.

376; Bradley vs. Jones, 22 Ill. 234; Rich vs. Johnson, 124

Ill. 134. To justify a court in setting aside a transfer for

fraud there must be an attempt to defraud or to obtain

action to purchase the stock. There is no fraud in such a case

of this essential element. This is the rule in Illinois, 22 Ill. 234; Rich vs.

Johnson, 22 Ill. 234. These parties received the stock for

the full value for the stock, and that they did not receive

it for the purpose of obtaining credit on Robinson. The

evidence shows that these three parties were interested in the

Illinois Wheel Company before the bankruptcy proceedings, and for

that reason they probably would want to buy the stock and keep it

in their own hands. If the stock was really the property of the

Robinson, there is no reason why they should have sold it, why they

would part with it to those three parties unless they did not

believe for it. We think the evidence fails to justify holding

them liable for the stock obtained by them. Counsel for the appellees

very earnestly insist that the transfer from Mrs. Robinson to the

was for a valuable consideration and was not fraudulent. We are

not impressed with appellees' position on this question. We are

not inclined to think the evidence sustains the contention of

appellees that such transfer was in fraud of creditors.

We are of the opinion that the chancellor was in error in

sustaining the exceptions to the master's report and dismissing

the bill for want of equity. Therefore, the decree will be re-

versed and the case will be remanded with directions to over-ride

the exceptions to the master's report, to enter a decree in con-

formity with the master's report, and to refer the same to the

master, if necessary, to state an account, charging Mrs. Robinson

with the value of the property which she received as the result

of the transfers of August and October, 1907, as found by the

STATE OF ILLINOIS, } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this. — — day of
— — — — in the year of our Lord one thousand
nine hundred and twenty-

Clerk of the Appellate Court.

226 I.A. 649

AT A TERM OF THE APPELLATE COURT,

gun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present—The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG 5 1922 the opinion of
the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

C. E. Enbloom,

Appellant,

vs.

Appeal from Knox

H. A. Bullock, et al,

Appellees,

Partlow, J.

On November 13, 1915, appellant, C. E. Enbloom, obtained a judgment in the circuit court of Knox county for \$932.19 against the A. Boyer Broom Company, a corporation, for broom corn sold to the corporation in 1914 and 1915. On January 23, 1917, a writ of fieri facias was issued and placed in the hands of the sheriff of Knox county and a levy was made upon certain real estate alleged to belong to the corporation. At the February term, 1917, of the circuit court of Knox county, appellant filed a bill against H.A. Bullock, Frank E. Johnson, Gust W. Rodelle, David Rame, L.D. Aiken, Ora Cunningham, A. Boyer Broom Company, a corporation, Mechanics Homestead and Loan Association, a corporation, and Fidelity Savings and Loan Society, a corporation, wherein appellant sought to have the real estate levied upon decreed to be the property of the corporation and subject to the payment of appellant's judgment. The bill was later dismissed as to Aiken, the Mechanics Homestead and Loan Association, and the Fidelity Savings and Loan Society. Upon issue being joined, the cause was referred to the master to take the evidence and report his conclusions. The master found the issues in favor of the appellees and recommended that the bill be dismissed for want of equity at the appellant's costs. Objections were filed to the master's report which were overruled, and upon a hearing before the chancellor, exceptions to the report were overruled and the bill was dismissed for want of equity, and from that decree this appeal was prosecuted.

2068 A 642

Appeal from Knox

vs.

H. A. Bullock, et al,

Partlow, J.

On November 18, 1918, appellant, O. E. Bullock, obtained a judgment in the circuit court of Knox county for \$382.19 against the A. Boyer Broom Company, a corporation, for broom corn sold to the corporation in 1916 and 1918. On January 28, 1919, a writ of fieri facias was issued and placed in the hands of the sheriff of Knox county and a levy was made upon certain real estate alleged to belong to the corporation. At the February term, 1919, of the circuit court of Knox county, appellant filed a bill against H. A. Bullock, Frank W. Johnson, Gust W. Redolice, David Kemp, E. D. Allen, One Cunningham, A. Boyer Broom Company, a corporation, Mechanics Homestead and Loan Association, a corporation, and Fidelity Savings and Loan Society, a corporation, wherein appellant sought to have the real estate levied upon decreed to be the property of the corporation and subject to the payment of appellant's judgment. The bill was later dismissed as to Allen, the Mechanics Homestead and Loan Association, and the Fidelity Savings and Loan Society. Upon issue being joined, the cause was referred to the master to take the evidence and report his conclusions. The master found the issues in favor of the appellees and recommended that the bill be dismissed for want of equity at the appellant's costs. Objections were filed to the master's report which were overruled, and upon a hearing before the chancellor, exceptions to the report were overruled and the bill was dismissed for want of equity, and from that decree this appeal was prosecuted.

This is, strictly speaking, nor a creditor's bill, but is a bill in aid of an execution, and seeks to have the real estate decreed to be the property of the corporation and subject to its debts. The contention of appellant is that the appellees were stockholders, directors and officers of the corporation and, for that reason, occupied a fiduciary relation to the corporation and its creditors; that while the real estate was transferred to these individuals, that under the law, they held it in trust for the corporation; and it was in fact the property of the corporation and liable for its debts.

There can be very little controversy as to the law applicable to this case. Officers and directors of a corporation occupy a fiduciary relation to the corporation and to its creditors. *Chetlain vs. Republic Life Insurance Co.* 86 Ill. 220. The directors of a corporation are chargeable with knowledge of all the facts concerning the financial condition of the corporation, and they cannot acquire the property of the corporation for their own use. *Moody vs. Chicago Title & Trust Co.* 126 Ill. App. 68; *Voorhees vs. Mason* 245 Ill. 256. Property subject to a trust may be reclaimed by the owner wherever it may be found, without regard to any change which may have been made in its form or condition. *Wobbe vs. Schaub*, 143 Ill. App. 361; *Rice vs. Dougherty*, 148 Ill. App. 368; *Union National Bank vs. Goetz*, 138 Ill. 127; *Maher vs. Larich*, 205 Ill. 242.

The master and the chancellor found that the appellant had failed to prove his case by a preponderance of the evidence, so the question presented for review is not a question of law, but is purely a question of fact, namely, whether the evidence supports the allegations of the bill so as to entitle appellant to the relief sought.

The evidence shows that on March 20, 1902, the A. Boyer Broom Company, a corporation, was engaged in the manufacture of brooms in the city of Galesburg, Knox county, and occupied a building

This is, strictly speaking, not a creditor's bill, but a bill in aid of an execution, and seems to have the real estate decreed to be the property of the corporation and subject to its debts. The contention of appellant is that the appellees were stockholders, directors and officers of the corporation and, for that reason, occupied a fiduciary relation to the corporation and its creditors; that while the real estate was transferred to them as individuals, that under the law, they hold it in trust for the corporation; and it was in fact the property of the corporation and its creditors.

There can be very little controversy as to the law applicable to this case. Officers and directors of a corporation occupy a fiduciary relation to the corporation and to its creditors. *Christie v. Republic Life Insurance Co.*, 86 Ill. 280. The directors of a corporation are chargeable with knowledge of all the facts concerning the financial condition of the corporation, and they cannot acquire the property of the corporation for their own use. *Wood v. Chicago Title & Trust Co.*, 111 Ill. 401. Property subject to a trust may be reclaimed by the owner whenever it may be found, without regard to any change which may have been made in its form or condition. *Woods v. Schuch*, 148 Ill. 499; *Rice v. Dougherty*, 148 Ill. 400; *Union National Bank v. Goetz*, 138 Ill. 127; *Kahan v. Libbert*, 205 Ill. 282.

The master and the chancellor found that the appellant had failed to prove his case by a preponderance of the evidence, so the question presented for review is not a question of law, but is purely a question of fact, namely, whether the evidence supports the allegations of the bill as to the title appellant to the real estate.

The evidence shows that on March 20, 1902, the A. Boyer Iron Company, a corporation, was engaged in the manufacture of iron in the city of Galesburg, Knox county, and occupied a building

located on the real estate in question, which real estate was the property of A. Boyer. On that date Boyer entered into a written contract with the officers of the corporation, by the terms of which, he contracted to deed the real estate to the corporation for \$7000.00, payable \$150.00 cash, and the balance at the rate of \$50.00 per month. Shortly afterwards, Bullock became the president of the corporation, and Johnson, Rodelle, Aiken and Ramp became the directors, and Ora Cunningham was the secretary. The payments, as provided in the contract, were made out of the funds of the corporation from 1902 to 1907, when Boyer died, and after his death some few payments were made, but shortly after his death default was made in these payments. It is claimed by appellant that this default was purposely made by the appellees so as to get the title to the property in their own name to the injury of the corporation, but we think this contention is not sustained by the evidence. On the contrary the evidence shows that at that time the corporation was not successful, but was in financial distress, and unable to make the payments on the contract. Albert J. Perry, as executor under the will of Boyer, at the February term, 1908, of the circuit court of Knox county, began suit to forfeit the contract. No defense was made to the suit and a judgment was entered for possession of the premises. On February 19, 1908, the directors of the corporation passed a resolution waiving the issuing of a writ of possession, and they surrendered possession of the property to the executor. Subsequently an attempt was made to raise the balance of the amount due on the contract and to redeem the property. To that end, application was made by the corporation to the Mechanics Homestead and Loan Association, of Galesburg, for a loan of \$2500.00, but the application of the corporation was refused unless the premises were deeded to the individual directors of the corporation and the loan was made to them as individuals. On April 7, 1908, the executor made a deed for the premises to Bullock, Johnson, Rodelle, Ramp and Aiken, which deed included, not only the real estate, but all the engines, boilers, machinery,

located on the real estate in question, which real estate was the property of A. Boyer. On that date Boyer entered into a written contract with the officers of the corporation, by the terms of which, he contracted to lease the real estate to the corporation for \$7000.00, payable \$150.00 cash, and the balance at the rate of \$50.00 per month. Shortly afterwards, Bullock became the president of the corporation, and Johnson, Robelle, Aiken and Kemp became the directors, and O. Cunningham was the secretary. The payments, as provided in the contract, were made out of the funds of the corporation from 1902 to 1907, when Boyer died, and after his death some few payments were made, but shortly after his death default was made in these payments. It is claimed by applicant that this default was purposely made by the applicant so as to get the title to the property in their own name to the injury of the corporation, but we think this contention is not sustained by the evidence. On the contrary the evidence shows that at that time the corporation was not successful, but was in financial distress, and unable to make the payments on the contract. Albert J. Foster, as executor under the will of Boyer, at the February term, 1908, of the circuit court of Knox county, began suit to foreclose the contract. No defense was made to the suit and a judgment was entered for possession of the premises. On February 18, 1908, the directors of the corporation passed a resolution waiving the assuming of a writ of possession, and they surrendered possession of the property to the executor. Subsequently an attempt was made to raise the balance of the amount due on the contract and to redeem the property. To that end, application was made by the corporation to the Mechanics Homestead and Loan Association, of Galesburg, for a loan of \$2500.00, but the application of the corporation was refused unless the premises were deeded to the individual directors of the corporation and the loan was made to them as individuals. On April 7, 1908, the executor made a deed for the premises to Bullock, Johnson, Robelle, Kemp and Aiken, which deed included, not only the real estate, but all the engines, boilers, machinery,

fixtures, tools and apparatus contained in the building used as a factory, whether the same were permanently attached to the building or not. After this deed was executed, the five grantees executed a mortgage to the Mechanics Homestead and Loan Association for \$2500.00. The monthly dues and interest on this loan were \$25.00. The corporation continued to occupy the premises after this loan was made and, to a certain extent, operated its business and paid the \$25.00 monthly dues and interest together with the taxes, from 1908 until 1915, when default was made by it in the payment of the dues and interest. There is a conflict in the evidence as to these payments. Appellant contends that they were made out of the funds of the corporation and were evidence of its ownership of the property, while appellees claim that appellees were the real owners of the property and these payments were made merely as rent while the corporation occupied the premises. In January, 1916, the corporation ceased to pay the dues, interest and taxes, and shortly thereafter it quit doing business, and its personal property was sold and the proceeds were applied to the payment of its debts. The building remained empty until 1919, when appellees sold and conveyed it to C. T. Childers.

The indebtedness of the corporation to appellant was for broom corn sold by him to the corporation, the first delivery being in March, 1914, and the last delivery being on January 25, 1915. Payment was made to appellant for this broom corn by notes, which were the basis of appellant's judgment. Appellant testified that, at the time the broom corn was delivered, he was told by Bullock, the president, and Ora Cunningham, the secretary, that the premises in question were the property of the corporation, but this is denied by both the president and the secretary.

These are substantially the facts as they appear in the evidence, and the question for determination is whether these facts were sufficient to establish appellant's case and entitle him to the relief sought. We have given to this evidence the careful consideration which it deserves and have reached the same conclusion

first, tools and equipment contained in the building used in the factory, whether the same were permanently attached to the building or not. After this deed was executed, the five grantees executed

a mortgage to the Mechanics Home Loan and Loan Association for \$2500.00. The monthly dues and interest on this loan were \$85.00.

The corporation continued to occupy the premises after this loan was made and, to a certain extent, operated its business and paid the \$85.00 monthly dues and interest together with the taxes, from 1908 until 1915, when default was made by it in the payment of the dues and interest. There is a conflict in the evidence as to these

payments. Appellant contends that they were made out of the funds of the corporation and were evidence of its ownership of the prop-

erty, while appellees claim that appellees were the real owners of the property and these payments were made merely as rent while

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dence, and the question for determination is whether these facts were sufficient to establish appellant's case and entitle him to

the relief sought. We have given to this evidence the careful con-

announced by the master and the chancellor. Our attention is not called to any place in the evidence which shows the actual value of this real estate. The evidence shows that the machinery of the corporation was of very little value and very little money was realized from its sale. Over twenty years ago, the premises were contracted for sale on the basis of \$7000.00, but there is nothing to show whether the premises were really worth that amount at that time. Only \$150.00 was paid in cash and the balance at \$50.00 per month, which was probably not more than what the rent would be. Payments were made from 1902 to 1907, the exact dates not appearing. During that time, if all payments were made for the full five years, they would only amount to \$3000.00, in addition to the cash payment of \$150.00. Of this \$3150.00, possibly the greater part would naturally be applied on interest, and the balance on the principal of the debt. Appellant contends that when the deed was made by the executor to the five appellees the debt was reduced to \$2500.00, and consequently \$4500.00 must have been paid by the corporation on the contract, but this contention is not sustained by the evidence. It is true the loan to the Mechanics Homestead and Loan Association was for \$2500.00, but how this balance was determined we cannot say, but apparently it was not because of \$4500.00 having been paid on the Boyer contract. When the transfer was made by the executor to the five appellees, it was apparently necessary so to do. The corporation had made default under the Boyer contract, and the Mechanics Homestead and Loan Association would not make a loan to the corporation, which was in financial distress and without credit. It was only by reason of the fact that the appellees pledged their individual credit that the premises did not, at that time, become the absolute property of the Boyer estate. It certainly cannot be successfully contended that this transfer made in 1908, almost seven years before appellant's indebtedness was incurred, was made for the purpose of defrauding appellant and depriving him of the money due him from the corporation. Considerable stress is laid by appellant on the fact

[illegible]

that after the loan was made to the Mechanics Homestead and Loan Association that the \$25.00 per month, together with the taxes, were paid by the corporation, but during all this time the corporation occupied the premises and appellees claim these payments were in the nature of rent. We cannot say this contention is not consistent with all the facts in the case. Bullock testified that the corporation paid the dues and taxes on the real estate as long as it had the money so to do, and it only ceased to pay them because it did not have the funds. He also testified that when default was made, the Mechanics Homestead and Loan Association instituted suit, and the appellees were compelled to pay the dues and interest from ~~that~~ that time on. He testified he paid about \$1300.00 as his share of the debts of the corporation, and after January, 1915, he and his associates paid the taxes, dues, interest, and other amounts due, from 1915 to 1919. Even if it be conceded, for the sake of argument, that the title was held in trust for the corporation, appellant would not be entitled to a first lien ahead of the appellees who had paid out various sums on the debts of the corporation before appellant became a creditor.

On October 3, 1906, the corporation conveyed to Aiken a part of the real estate described in the bill as Lot 15 in Boyer's Subdivision, for a stated consideration of \$1500.00, and on November 24, 1909, a second deed was executed by the corporation to Aiken for the same property, the second deed being made for the purpose of correcting a mistake in the first deed, the consideration being omitted from that instrument. The bill alleged that these deeds were fraudulent and void, were made without consideration, and that Aiken now holds the property in trust for the benefit of the corporation. The only evidence in the record as to these conveyances shows that Lot 15 was purchased for the corporation by Aiken without authority of the directors; that Lot 15 never in fact belonged to the corporation, and afterwards the directors required Aiken to take the property, and the conveyance

that after the loan was made to the Mechanics Loan and Loan Association that the \$25.00 per month, together with the taxes, were paid by the corporation, but during all this time the corporation occupied the premises and appelles claim those payments were in the nature of rent. He cannot say this contention is not consistent with all the facts in the case. Baillet testified that the corporation paid the dues and taxes on the real estate as long as it had the money up to 30, and it only ceased to pay them because it did not have the funds. He also testified that when default was made, the Mechanics Loan and Loan Association instituted suit, and the appelles were compelled to pay the due and interest from that time on. He testified he paid about \$1200.00 as his share of the debts of the corporation, and after January, 1912, he and his associates paid the taxes, dues, interest, and other amounts due, from 1912 to 1913. Even if it be conceded, for the sake of argument, that the title was held in trust for the corporation, appellant would not be entitled to a third lien ahead of the appelles who had paid out various sums on the debts of the corporation before appellant became a creditor. On October 3, 1908, the corporation conveyed to Allen a part of the real estate described in the bill as lot 15 in Beaver subdivision, for a stated consideration of \$1500.00, and on November 24, 1908, a second deed was executed by the corporation to Allen for the same property, the second deed being made for the purpose of correcting a mistake in the first deed, the consideration being omitted from that instrument. The bill alleged that these deeds were fraudulent and void, were made without consideration, and that Allen now holds the property in trust for the benefit of the corporation. The only evidence in the record as to these conveyances shows that lot 15 was purchased for the corporation by Allen without authority of the directors; that lot 15 never in fact belonged to the corporation, and afterwards the directors required Allen to take the property, and the conveyance

was made to him for that purpose. The master found that the corporation was never beneficially seized of Lot 15, and that these conveyances were wholly immaterial in this litigation. From our examination of the evidence we hold that the master was fully justified in this finding.

The bill is based upon the fiduciary relation of these appellees to the corporation, and alleged that the acts of the appellees were fraudulent and void, and were for the purpose of converting the property to the use of the appellees to the injury of appellant and the creditors. The most of the evidence consists of documents and the testimony of Bullock and Ora Cunningham. Fraud is not to be presumed. Something more than a mere suspicion is required to prove an allegation of fraud. The evidence must be clear and cogent and must leave the mind satisfied that the charge is true. Where an act may be traced to an honest intent as well as to a corrupt one, the former is to be preferred. In order to avoid a deed for fraud both the vendor and the vendee must be shown to have intended to commit the fraud. They must both be guilty of the connivance and the intent. *Altman & Taylor Co. vs. Weir*, 34 Ill. App. 615; *Berkey & Gray Furniture Co. vs. Thein*, 89 Ill. App. 207; *Hatch vs. Jordon*, 74 Ill. 414; *Dickerson vs. Evans*, 84 Ill. 451; *Dexter vs. McAfee*, 163 Ill. 508. We are of the opinion that the evidence fails to sustain the allegations of the bill; that it fails to show that appellees were guilty of the fraud charged against them; that it fails to show that the real estate in question is the property of the corporation and subject to the payment of appellant's judgment. For these reasons the bill was properly dismissed for want of equity.

There is another reason why the bill was properly dismissed. The deed from the executor of Boyer was to Bullock, Aiken, Johnson, Rodelle and Ramp, and all of them were made parties defendant to the bill, which was filed to the February term, 1917. Aiken died

was made to him for that purpose. The master found that the corporation was never beneficially owned by the appellant, and that there were no conveyances were wholly immaterial in this litigation. From our examination of the evidence we hold that the master was fully justified in this finding.

The bill is based upon the fiduciary relation of the appellants to the corporation, and alleges that the acts of the appellants were fraudulent and void, and were for the purpose of converting the property to the use of the appellants to the injury of the appellant and the creditors. The next of the evidence consists of documents and the testimony of Bullock and Mrs. Cunningham. There is not to be presumed. Something more than a mere suspicion is required to prove an allegation of fraud. The evidence must be clear and cogent and must leave the mind satisfied that the charge is true. Where an act may be traced to an honest intent as well as to a corrupt one, the former is to be preferred. In order to avoid a deed for fraud both the vendor and the vendee must be shown to have intended to commit the fraud. They must both be guilty of the commission and the intent. *William T. Taylor Co. vs. Weir*, 24 Ill. App. 215; *Berkley & Gray Manufacturing Co. vs. Thoin*, 22 Ill. App. 207; *Waters vs. Jordan*, 14 Ill. App. 215; *Johnson vs. Evans*, 24 Ill. App. 215; *Dexter vs. Hester*, 122 Ill. App. 208. No one is the opinion that the evidence fails to sustain the allegations of the bill; that it fails to show that appellants were guilty of the fraud charged; that it fails to show that the appellants and real estate in question is the property of the corporation and subject to the payment of appellant's judgment. For these reasons the bill was properly dismissed for want of equity.

There is another reason why the bill was properly dismissed. The deed from the executor of Hoyer was to Bullock, Allen, Johnson, Roberts and Kemp, and all of them were made parties defendant to the bill, which was filed to the February term, 1911. Allen died

in 1910, before the bill was filed, and the bill was subsequently dismissed as to him. Ramp died in 1911, before the bill was filed, but the bill was not dismissed as to him. None of the heirs of either Aiken or Ramp were made parties defendant. Affirmative relief was prayed against both Aiken and Ramp. Both of them, if they were living or their heirs if they were dead, were necessary parties to the bill. These parties were entitled to their day in court, and a decree could not be entered against their interests without a hearing. This real estate could not be subjected to the payment of appellant's debt without a finding by the court that the conveyance to Aiken and Ramp was in trust for the corporation. Because of a lack of necessary parties, the court was without jurisdiction to grant the entire relief prayed for in the bill, even though the evidence amply sustained the allegations of the bill.

For the reasons indicated, the decree will be affirmed.

Decree affirmed.

in 1910, before the bill was killed, and the bill was subsequently
dismissed as to him. Kamp died in 1911, before the bill was killed,
but the bill was not dismissed as to him. None of the heirs of
either Allen or Kamp were made parties defendant. Allegations re-
sulted was prayed against both Allen and Kamp. Both of them, if
they were living or their heirs if they were dead, were necessarily
parties to the bill. These parties were entitled to their day in
court, and a decree could not be entered against them without
without a hearing. This real estate could not be subjected to
the payment of appellant's debt without a finding by the court
that the conveyance to Allen and Kamp was in trust for the con-
veyance. Because of a lack of necessary parties, the court was
without jurisdiction to grant the entire relief prayed for in the
bill, even though the evidence amply sustained the allegations
of the bill.

For the reasons indicated, the decree will be affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. { ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this- 6th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty- two

Justus L. Johnson
Clerk of the Appellate Court.



*Opinion modified
R. H. denied
Oct. 3, 1922*

7073

226 T. A. 650

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present—The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 5 1922

the opinion of

the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

People of the State of Illinois,
Defendant in Error,

226 T.A. 650

vs.

Error to county court

Stanley Bishop,

of Lake

Plaintiff in Error,

Partlow, J.

The plaintiff in error, Stanley Bishop, was found guilty by a jury in the county court of Lake county under the seventh, eighth, ninth and tenth counts of an information charging the violation of the Prohibition Act. After the verdict, the eighth and tenth counts were nollied by the State's attorney, and the plaintiff in error was sentenced under the seventh count, which charged an unlawful attempt to manufacture intoxicating liquor, and under the ninth count, which charged the unlawful operation of a still. To review the judgment rendered upon the verdict, a writ of error has been prosecuted from this court.

It is urged that the evidence does not sustain the verdict. The evidence shows that on September 8, 1921, the plaintiff in error lived at 1409 Victoria street, North Chicago, Lake county. On that date C. A. Bruns, a constable, and D. A. Weale, with a search warrant for the premises, which were owned by the plaintiff in error, went to the house of the plaintiff in error and found him standing on the front porch. When he saw the officers he went into the house and ran away. The officers went into the building, made a search and found a coffee pot containing whiskey, and in the basement they found a gas stove with a copper still on it. There was a barrel of corn mash, several large milk cans full of liquor, a rubber hose and similar articles. In the basement they found a man by the name of Tony Paza. The officers testified that the plaintiff in error, at the time they arrested him, admitted that he was trying to manufacture intoxicating liquor. They also

2261 A. 650

People of the State of Illinois,
Defendants in Error.

Where it comes down

vs.

et al.

Plaintiff in Error.

Plaintiff in Error.

Plaintiff in Error.

The plaintiff in error, Stanley Bishop, was found guilty by

a jury in the county court on June twenty and the verdict,

eight, ninth and tenth counts of an indictment charging the

violation of the prohibition act. When the verdict was given

and tenth counts were rolled by the State's attorney, and the

plaintiff in error was sentenced under the seventh count, which

charged an unlawful attempt to manufacture intoxicating liquor,

and under the eighth count, which charged the unlawful possession of

a still. He served the judgment rendered upon the verdict, and

of error has been presented from this count.

It is argued that the evidence does not sustain the verdict.

The evidence shows that on September 8, 1931, the plaintiff in error

lives at 1403 Robert Street, North Chicago, Cook County, and that

late C. A. Brown, a constable, and in a party with a woman

warrant for the premises, which were used by the plaintiff in

error, went to the house of the plaintiff in error and found him

standing on the front porch. Then he and the officers he went into

the house and ran away. The officers went into the building, and

a search and found a coffee pot containing whiskey, and in the

basement they found a gas stove with a copper still on it. There

was a barrel of corn meal, several bags of corn meal and a bag of sugar.

A rubber hose and similar equipment. In the basement they found a

bag of the name of Tony Sam. The officers testified that the

plaintiff in error, at the time they entered the premises, was

he was trying to manufacture intoxicating liquor. They also

testified that when they first saw him he had a granito coffee pot in his hand, and he threw the contents of the pot over the porch rail and went into a store next door to his house and said to the storekeeper that he was again arrested, or words to that effect. The witnesses for the State testified that they tasted the contents of these exhibits and that they contained intoxicating liquor. Tona Paza was called as a witness for the plaintiff in error, and testified that he was the owner of the still, and that he was making liquor for his own use on the premises of the plaintiff in error, who had no knowledge of that fact. The plaintiff in error testified that he did not participate in the manufacture of the liquor, and did not know that Paza was manufacturing liquor in his residence. The storekeeper next door, in rebuttal, testified that while the officers were searching the premises, the plaintiff in error came into the store confused and excited and exclaimed "They got me, they got me".

It is insisted by the plaintiff in error that this evidence was not sufficient to prove, beyond a reasonable doubt, that he was operating a still, or that he was attempting to manufacture intoxicating liquor, but, on the contrary, the evidence shows that it was being manufactured by another man without his knowledge and consent. Simply because the witnesses for the defendant in error testified to one state of facts and the witnesses for the plaintiff in error testified to another state of facts entirely different therefrom, it does not necessarily follow that the defendant in error failed to make out a case beyond a reasonable doubt. It is the special province of the jury to weigh the evidence in the light of all the facts and circumstances and determine where the truth is. After a jury has thus determined where the truth is, the verdict will not be set aside unless the court can say that it is plainly against the weight of the evidence. *People vs. Conners*, 246 Ill. 9; *People vs. Scott*, 261 Ill. 165; *People vs. Cassidy*, 283 Ill. 398. Under the facts appearing in evidence,

testified that when they first saw him he had a cigarette in his hand, and he threw the cigarette of the car over the porch rail and went into a store next door to his house and said to the storekeeper that he was again arrested, or words to that effect. The witnesses for the state testified that they saw the car-
rents of these exhibits and that they concerned interested parties. Tom Page was called as a witness for the plaintiff in error, and testified that he was the owner of the car, and that he was tak-
ing liquor for his own use on the premises of the plaintiff in error, who had no knowledge of that fact. The plaintiff in error testified that he did not participate in the manufacture of the liquor, and did not know that there was manufacturing liquor in his residence. The storekeeper next door, in fact, testified that while the officers were searching the premises, the plaintiff in error came into the store and asked for cigarettes. They got no, they got no.
It is insisted by the plaintiff in error that this evidence was not sufficient to prove, beyond a reasonable doubt, that he was operating a still, or that he was attempting to manufacture in-
temperate liquor, but, on the contrary, the evidence shows that it was being manufactured by another man without the knowledge and consent. Simply because the witnesses for the defendant in error testified to one state of facts and the witnesses for the plain-
tiff in error testified to another state of facts entirely differ-
ent therefrom, it does not necessarily follow that the defendant in error failed to make out a case beyond a reasonable doubt. It is the special province of the jury to weigh the evidence in the light of all the facts and circumstances and determine what the truth is. After a jury has thus determined where the truth is, the verdict will not be set aside unless the court can say that it is plainly against the weight of the evidence. People vs. Conners, 240 Ill. 2; People vs. Scott, 231 Ill. 188; People vs. Canally, 228 Ill. 308. Under the facts appearing in evidence,

the jury had a right to determine that it was highly improbable that the manufacture of liquor was being carried on in the plaintiff in error's house, on such a large scale, without his knowledge and consent by Raza, who did not live there, and merely went there, as he testified, so he could use the gas stove. If the jury believed the witnesses for the defendant in error rather than the evidence on behalf of plaintiff in error, which they had a right to do, they were justified in finding the plaintiff in error guilty under the seventh and ninth counts. We think the guilt of the plaintiff in error was properly established by the evidence.

A search warrant, which was in the possession of the officers when they went to the plaintiff in error's house, was offered in evidence by the defendant in error. The plaintiff in error objected to it on the ground that there was no proof of the filing of a sworn complaint before the warrant was issued, and that the warrant was not in the form provided by the statute. The objection was overruled and the warrant was admitted. Later on the question again arose relative to this warrant, and counsel for plaintiff in error objected to it because it did not prove anything, and was misleading to the jury, whereupon it was withdrawn by the defendant in error, and the court announced that the question relative to the search warrant would be covered by an instruction to the jury, but no instruction was given. Plaintiff in error insists that the warrant was defective; was improperly admitted in evidence; that its withdrawal did not cure the error; and that exhibits improperly secured under it by the witnesses for the defendant in error were introduced in evidence.

The difficulty with this contention is that there is nothing in the record to sustain the contention, except that a search warrant was admitted in evidence and afterwards withdrawn. The warrant is not in the record so we can inspect it and determine whether or not it was defective, or was improperly admitted in evidence. The evidence shows that at the time the officers went to the plaintiff in error's house they had a search warrant.

the jury had a right to determine that it was highly improbable that the maintenance of liquor was being carried on in the place -
-till in error's house, on such a large scale, without his knowledge and consent by James, who did not live there, and merely went there, as he testified, as he could use the gas stove. If the jury believed the witnesses for the defendant in error rather than the evidence on behalf of plaintiff in error, which they had a right to do, they were justified in finding the plaintiff in error guilty under the seventh and ninth counts. We think the guilt of the plaintiff in error was properly established by the evidence. A search warrant, which was in the possession of the officers when they went to the plaintiff in error's house, was returned in evidence by the defendant in error. The plaintiff in error objected to it on the ground that there was no proof of the filing of a sworn complaint before the warrant was issued, and that the warrant was not in the form provided by the statute. The objection was overruled and the warrant was admitted. Later on the question again arose relative to this warrant, and counsel for plaintiff in error objected to it because it did not prove anything, and was misleading to the jury, whereupon it was withdrawn by the defendant in error, and the court announced that the question relative to the search warrant would be covered by an instruction to the jury, but no instruction was given. Plaintiff in error insists that the warrant was defective; was improperly admitted in evidence; that its withdrawal did not cure the error; and that exhibits improperly secured under it by the witnesses for the defendant in error were introduced in evidence. The difficulty with this contention is that there is nothing in the record to sustain the contention, except that a search warrant was admitted in evidence and afterwards withdrawn. The warrant is not in the record so we can inspect it and determine whether or not it was defective, or was improperly admitted in evidence. The evidence shows that at the time the officers went to the plaintiff in error's house they had a search warrant.

The warrant was not read to the jury and we cannot see how its admission and subsequent withdrawal injured the plaintiff in error. It is nowhere pointed out in what respect it did not comply with the statute. Sections 30 and 31 of the Prohibition Act, chapter 43, do not provide that the complaint, affidavit and warrant shall consist of one instrument. The complaint and affidavit are filed with the court issuing the warrant, while the warrant is delivered to the officer charged with its execution. If the complaint and affidavit were not filed as provided by the statute, and the warrant was issued without a sworn complaint having been filed, that fact should have been shown. If the defendant in error did not see fit to prove it, then the plaintiff in error had the right to do so. The mere statement of the plaintiff in error that the warrant was defective, without the record so showing, was not sufficient to raise the question in this court of its sufficiency. Not only is the record silent on this point, but there is no showing in the record that any injury was sustained by the plaintiff in error, even if the warrant was improperly issued. Several exhibits, including the still, gas stove, barrel of mash, milk cans, and liquor, were admitted in evidence. The abstract shows that they were all offered together as exhibits 1 to 10, inclusive, except exhibit 2, which was the warrant. The abstract shows that a general objection was made to all of these exhibits. There was no special objection on the ground that some or all of them were improperly secured under the search warrant. Some of the exhibits may have been admissible and others may not have been. The general objection was not sufficient to preserve the point now sought to be raised. There should have been a special objection so that the court could have ruled specifically on the point and so the defendant in error could, if necessary, have introduced other evidence to cover the objection. The record is in such a condition that the question now sought to be raised was not preserved for review in this court. If the plaintiff in error desired to have that question covered by

The warrant was not read to the jury and we cannot see how its admission and subsequent withdrawal injured the plaintiff in error. It is nowhere pointed out in what respect it did not comply with the statute. Sections 30 and 31 of the Probation Act, Chapter 43, do not provide that the complaint, affidavit and warrant shall consist of one instrument. The complaint and affidavit are filed with the court issuing the warrant, while the warrant is delivered to the officer charged with its execution. In the complaint and affidavit were not filed as provided by the statute, and the warrant was issued without a sworn complaint having been filed, that fact should have been shown. If the defendant in error did not see fit to prove it, then the plaintiff in error had the right to do so. The mere statement of the plaintiff in error that the warrant was defective, without the record so showing, was not sufficient to raise the question in this court of its sufficiency. Not only is the record silent on this point, but there is no showing in the record that any injury was sustained by the plaintiff in error, even if the warrant was improperly issued. Several exhibits, including the still, gas stove, barrel of man, milk cans, and liquor, were admitted in evidence. The abstract shows that they were all offered together as exhibits 1 to 10, inclusive, except exhibit 2, which was the warrant. The abstract shows that a general objection was made to all of these exhibits. There was no special objection on the ground that none or all of them were improperly received under the search warrant. Some of the exhibits may have been admissible and others may not have been. The general objection was not sufficient to preserve the point now sought to be raised. There should have been a special objection so that the court could have ruled specifically on the point and so the defendant in error could, if necessary, have introduced other evidence to cover the objection. The record is in such a condition that the question now sought to be raised was not preserved for review in this court. If the plaintiff in error desired to have that question covered by

an instruction as indicated by the court at the time the search warrant was withdrawn, such an instruction should have been offered by the plaintiff in error, which he did not do, and for that reason he cannot now complain of his own omission.

On the examination of Ira Stevens, as a juror, he stated that, in a liquor case, he would not require as convincing proof to find the defendant guilty as he would in a murder case; that he did not consider the two cases of equal importance, and that he might be more easily convinced in a liquor case than in a murder case. The plaintiff in error then challenged the juror for cause, and in response to a question from the court the juror said that he felt that he could render a fair and impartial verdict in the case, and that he would follow the law and the evidence. The court then overruled the challenge and the plaintiff in error excused the juror peremptorily. In his place Charles W. Brockway was called, and the plaintiff in error challenged him on the ground that Stevens should have been excused for cause, but this challenge was also overruled. The plaintiff in error contends that because of these rulings he was improperly compelled to be tried by Brockway, who was a hostile juror. There are several reasons, ^{why} these alleged errors cannot be sustained. The first one is that the answers of Stevens, taken as a whole, showed that he was a competent juror. He merely said that he did not consider a liquor case and a murder case to be of equal importance, but he also said that he could and would give the plaintiff in error a fair and impartial trial, and would be governed by the law and the evidence. These answers were sufficient to justify the court in overruling the challenge for cause. The next reason is that when Stevens was excused and Brockway called, the latter was challenged on the ground that Stevens should have been excused. The ruling as to Stevens was no ground, in the absence of other reasons, for the challenge of Brockway. The examination of Brockway does not appear in the abstract, and he may have been in every respect

an instruction as indicated by the court at the time the second
warrant was withdrawn, such an instruction should have been offered
of by the plaintiff in error, which he did not do, and for that
reason he cannot now complain of his own omission.

On the examination of Mrs. Stevens, as a juror, he stated
that, in a liquor case, he would not require as convincing proof
to find the defendant guilty as he would in a murder case; that he
did not consider the two cases of equal importance, and that he
might be more easily convinced in a liquor case than in a murder
case. The plaintiff in error then challenged the juror for cause,
and in response to a question from the court the juror said that
he felt that he could render a fair and impartial verdict in the
case, and that he would follow the law and the evidence. The court
then overruled the challenge and the plaintiff in error excused
the juror peremptorily. In his place Charles W. Brockway was sel-
ed, and the plaintiff in error challenged him on the ground that
Stevens should have been excused for cause, but this challenge
was also overruled. The plaintiff in error contends that because
of these rulings he was improperly compelled to be tried by Brock-
way, who was a hostile juror. There are several reasons ^{why} these
alleged errors cannot be sustained. The first one is that the
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petent juror. He merely said that he did not consider a liquor
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Stevens was no ground, in the absence of other reasons, for the
challenge of Brockway. The examination of Brockway does not
appear in the abstract, and he may have been in every respect

qualified for service in the case.

In rebuttal, the man who kept a store next door south of the premises of plaintiff in error was called and testified to certain remarks of the plaintiff in error in the store at the time of his arrest. The plaintiff in error insists that this evidence was improperly admitted because the name of this witness had not been furnished to the plaintiff in error prior to the trial. Section 1, subdivision 13, chapter 38, of the statutes provided that in all felony cases the defendant shall be furnished with a list of the witnesses, and in all other cases he shall, at his request, be furnished with a list of the witnesses. The charge against the plaintiff in error was not a felony, but was a misdemeanor. He had, however, requested a list of the witnesses and it had been furnished. The furnishing of a list of witnesses, even in felony cases, does not preclude the calling of witnesses whose names have not been furnished to the defendant. It had been held in a long line of cases that the right to call witnesses whose names are not on the list furnished is a matter of discretion with the trial court, even in felony cases, *People vs. Steinhauser*, 248 Ill. 46, and the same rule is applicable to misdemeanors. It

qualified her service in this case.

In rebuttal, the man who had a name most like Smith of the names of plaintiff in error was called and testified to certain remarks of the plaintiff in error in the witness stand at the time of his arrest. The plaintiff in error insists that this evidence was improperly admitted because the name of this witness had not been furnished to the plaintiff in error prior to the trial. Section 1, subdivision 12, Chapter 30, of the statutes provided that in all felony cases the defendant shall be furnished with a list of the witnesses, and in all other cases he shall, at his request, be furnished with a list of the witnesses. The charge against the plaintiff in error was not a felony, but was a misdemeanor. He had, however, requested a list of the witnesses and it had been furnished. The furnishing of a list of witnesses, even in felony cases, does not preclude the calling of witnesses whose names have not been furnished to the defendant. It had been held in a long line of cases that the right to call witnesses whose names are not on the list furnished is a matter of discretion with the trial judge, and is applicable to misdemeanors. 248 Ill. 46, and the same rule is applicable to misdemeanors.

has also been held that this section of the statute does not apply to witnesses called in rebuttal. The court did not commit error in permitting the witness to testify in rebuttal.

Complaint is made of the twelfth, fifteenth and twenty-first instructions given on behalf of defendant in error, and of the refusal of the court to give seven instructions offered by the plaintiff in error. The twelfth instruction was with reference to the weight to be given to the evidence of the defendant, and announced the correct rule of law, and was substantially the same as the thirteenth instruction offered by the plaintiff in error and refused. The fifteenth instruction merely recited the various sections of the Prohibition Act under which the prosecution was based, and our attention is not called to any respect in which the provisions of the law were not properly announced in the instruction. The twenty-first instruction defined the term reasonable doubt as approved on many occasions, and for that reason it was not necessary to give the first instruction refused, which was on the same subject. The other five instructions refused on behalf of the plaintiff in error were covered by other instructions given. From our examination of the instructions we are of the opinion they fully covered all propositions of law necessary for the information of the jury in determining the guilt or innocence of the plaintiff in error.

The seventh count of the information charged the plaintiff in error with an unlawful attempt to manufacture intoxicating liquor, and the court sentenced the plaintiff in error to pay a fine of two hundred dollars and to be imprisoned in the county jail for sixty days. The Prohibition Act provides no punishment for an attempt to manufacture intoxicating liquor, so the punishment was controlled by the provisions of section 610, chapter 38, Cahill's statute, page 1273, which provides that where an attempt is made to commit an offense prohibited by law and no punishment is otherwise provided, the offender, upon conviction, where the offense is not a felony, shall be by fine not exceeding three

has also been held that this section of the statute does not apply to witnesses called in rebuttal. The court did not commit error in permitting the witness to testify in rebuttal.

Complaint is made of the tenth, thirteenth and twenty-first instructions given on behalf of defendant in error, and of the refusal of the court to give seven instructions offered by the plaintiff in error. The seventh instruction was with reference to the weight to be given to the evidence of the defendant, and announced the common rule of law, and was substantially the same as the thirteenth instruction offered by the plaintiff in error and refused. The thirteenth instruction merely recited the various sections of the Constitution and statutes which the prosecution was based, and our attention is not called to any request to refuse the provisions of the law were not properly announced in the instruction. The twenty-first instruction defined the term reasonable doubt as approved on many occasions, and for that reason it was not necessary to give the first instruction refused, which was on the same subject. The other five instructions referred to by the plaintiff in error were covered by other instructions given.

From our examination of the instructions we are of the opinion they fully covered all propositions of law necessary for the information of the jury in determining the guilt or innocence of the defendant in error.

The seventh count of the information charged the defendant in error with an unlawful attempt to manufacture intoxicating liquor, and the court sentenced the plaintiff in error to pay a fine of two hundred dollars and to be imprisoned in the county jail for sixty days. The prohibition act provides no punishment for an attempt to manufacture intoxicating liquor, as the punishment was controlled by the provisions of section 510, chapter 22, Cahill's statute, page 1275, which provides that where an attempt is made to commit an offense prohibited by law and no punishment is otherwise provided, the offender, upon conviction, shall be

hundred dollars, or imprisonment in the county jail not exceeding six months. This statute does not provide for both fine and imprisonment. The ninth count charged plaintiff in error with unlawfully operating a still, and on this count he was fined three hundred dollars and sentenced to the county jail for sixty days. Section 27 of the Prohibition Act, for the operation of a still, provides a penalty of not more than two hundred dollars, or imprisonment not exceeding six months, or both. The fine under this count of the information was three hundred dollars, which was in excess of the maximum provided in the statute. Under both counts the sentence was not in accordance with the statute, and for that reason the judgment must be reversed. It has been held, under similar circumstances, that the proper practice is to reverse the judgment and remand the cause to the trial court with directions to enter judgment as provided by law. *Henderson vs. People*, 165 Ill. 607; *People vs. Neathery*, 227 Ill. 110.

For the error in not sentencing the plaintiff in error as provided by the statute, the judgment will be reversed and the cause remanded with directions to the trial to enter judgment as provided by law.

Reversed and remanded with directions.

hundred dollars, or imprisonment in the county jail not exceeding six months. This statute does not provide for both fine and imprisonment. The ninth count charged plaintiff in error with unlawfully operating a still, and on this count he was fined three hundred dollars and sentenced to the county jail for thirty days. Section 27 of the prohibition act, for the operation of a still, provides a penalty of not more than two hundred dollars, or imprisonment not exceeding six months, or both. The fine under this count of the information was three hundred dollars, which was in excess of the maximum provided in the statute. Under both counts the sentence was not in accordance with the statute, and for that reason the judgment must be reversed. It was also held, under similar circumstances, that the proper practice is to reverse the judgment and remand the cause to the trial court with directions to enter judgment as provided by law. *Hanftson vs. People*, 188 Ill. 807; *People vs. Leahy*, 225 Ill. 110.

For the error in not reversing the judgment in error as provided by the statute, the judgment will be reversed and the cause remanded with directions to the trial court to enter judgment as provided by law.

REVEREND AND HONORABLE JUSTICE

STATE OF ILLINOIS, }
SECOND DISTRICT. }

ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-

Clerk of the Appellate Court.

7076

226-A-650

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

present—The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG 5 1922 the opinion of
the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Stockton Electric Company,
Appellee,

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vs.

Appeal from Stephenson

Lena Electric Light and Power
Company,
Appellant,

Partlow, J.

Appellee, the Stockton Electric Company, filed its bill in the circuit court of Stephenson county against appellant, the Lena Electric Light and Power Company, praying for an injunction to restrain appellant from cutting off the electric services which appellant was furnishing to the appellee, and a temporary injunction was granted. An answer was filed by appellant, also a cross-bill praying that a judgment be rendered against appellee for an unpaid balance which appellant claims was due from appellee for prior service. There was a hearing before the chancellor, a decree was entered finding that the amount claimed by appellant from appellee was not due, and the injunction was dissolved on the ground that a new rate had been put in force and effect after the injunction was granted and that no injunction was necessary. From that decree an appeal was prosecuted.

On October 3, 1919, appellant and appellee entered into a written contract wherein appellant was to furnish electric power to appellee. The rate to be charged was set forth in the contract, which was approved by the Public Utilities Commission on October 31, 1919. The contract provided that the rates stated were the legal rates of appellant on file with the Public Utilities Commission and were subject to change by order of the commission. Appellant filed its schedule with the Public Utilities Commission on November 24, 1920, asking for an increase of rates to become effective December 10, 1920. On December 14, 1920, there was a hearing before the commission upon the new schedule, but no decision was rendered until June 27, 1921. There was no suspension of the rates by the commission and it issued no

Stockton Electric Company,
Appellee,

2261 A. 65
Appeal from judgment

From electric light and power

San Jose, Cal.

Appellee, the Stockton Electric Company, filed its bill in the circuit court of the San Joaquin county against appellant, the Stockton Electric Light and Power Company, praying for an injunction to restrain appellant from cutting off the electric service which appellant was furnishing to the appellee, and a temporary injunction was granted. An answer was filed by appellant, also a cross-bill praying that a judgment be rendered against appellee for an unpaid balance which appellant claimed was due from appellee for prior service. There was a hearing before the chancellor, a decree was entered finding that the amount claimed by appellant from appellee was not due, and the injunction was dissolved on the ground that a new rate had been put in force and effect after the injunction was granted and that no injunction was necessary. From that decree an appeal was prosecuted.

On October 3, 1919, appellant and appellee entered into a written contract wherein appellant was to furnish electric power to appellee. The rate to be charged was set forth in the contract, which was approved by the Public Utilities Commission on October 31, 1919. The contract provided that the rates stated were the legal rates of appellee on file with the Public Utilities Commission and were subject to change by order of the commission. Appellant filed its schedule with the Public Utilities Commission on November 24, 1920, asking for an increase of rates to become effective December 1, 1920. On December 14, 1920, there was a hearing before the commission upon the new schedule, and no objection was raised to the same. There was no objection of the rates by the commission and it issued no

temporary orders with reference thereto. The commission, on July 27, 1921, suspended the rate authorized in the contract and placed in effect a new schedule different from the rates in the contract, and different from the rates asked for by appellant. The new rates became effective August 1, 1921.

Appellant contends that the new rate filed on November 2, 1920, which was higher than the one in the contract, went into force and effect at the expiration of thirty days from the time of the application for the increase; that appellee should have paid for electricity at the new rate instead of the old rate; that from the time of the filing of the new rate with the Public Utilities Commission, up to June 14, 1921, there was due appellant from appellee, \$968.45, being the difference between the old rate and the new rate, which amount had increased at the time of the hearing to \$1345.83. Appellant served notice on appellee, about June 14, 1921, that unless appellee paid the \$968.45, appellant would refuse to furnish further electric power to appellee. Appellee filed a bill for an injunction, and a temporary injunction was issued preventing the appellant from carrying out this threat, and upon a hearing on the merits, the chancellor found that the appellant was not entitled to the amount claimed, and dissolved the temporary injunction for the reason that a new rate had been established by the Public Utilities Commission and the injunction was no longer necessary.

The only contention of the appellant is that because of the failure of the Public Utilities Commission to suspend the rates pending the hearing, that the new rates went into force and effect thirty days after they were filed as provided in Section 36 of the statute. In the case of Michel vs. Illinois Bell Telephone Co., Ill.App. (filed in August, 1921, we decided the exact question here presented, contrary to the claim of the appellant. We there held that the new rates, even though they were not suspended, did not go into force and effect, under Section 36, until after a hearing by the Public Utilities Commission and a finding by the commission that the increased rates were justified. To the same effect is Illinois Bell

temporarily ordered with reference thereto. The Commission, on July 24, 1931, suspended the rate authorized in the contract and placed in effect a new schedule different from the rates in the contract, and different from the rates asked for by applicant. The new rates became effective August 1, 1931.

Applicant contends that the new rates filed on November 2, 1930, which was higher than the one in the contract, went into force and effect at the expiration of thirty days from the time of the suspension for the increase; that applicant should have paid for electricity at the new rate instead of the old rate; that from the time of the filing of the new rate with the Public Utilities Commission, up to June 14, 1931, there was one applicant from applicant, \$708.45, being the difference between the old rate and the new rate, which amount had increased at the time of the hearing to \$1235.00. Applicant paid the \$708.45, applicant would refuse to pay the further electric power to applicant. Applicant filed a bill for an injunction, and a temporary injunction was issued preventing the applicant from carrying out this threat, and upon a hearing on the matter, the commission found that the applicant was not entitled to the amount claimed, and dissolved the temporary injunction for the reason that a new rate had been established by the Public Utilities Commission and the injunction was no longer necessary.

The only contention of the applicant is that because of the failure of the Public Utilities Commission to suspend the rates pending the hearing, that the new rates went into force and effect thirty days after they were filed as provided in Section 36 of the statute. In the case of *Michael v. Illinois Bell Telephone Co.*, 111 Ill. App. (1) filed in August, 1931, we decided the exact question now presented, contrary to the claim of the applicant. We there held that the new rates, even though they were not suspended, did not go into force and effect, under Section 36, until after a hearing by the Public Utilities Commission and a finding by the commission that the proposed rates were justified. We the same effect in *Illinois Bell*

Telephone Co. vs. Ill. Commerce Commission, ___Ill. App.____,
(decided by the Appellate Court of the Third District July 9, 1922,
Gen. No. 7878, April Term, 1922.) The increased rates filed by the
appellant were not approved by the Public Utilities Commission until
July 27, 1921, and did not go into effect until August 1, 1921.
Until the new rates went into force and effect appellee was not
liable for their payment and therefore appellee was not indebted to
appellant in the amount of the difference between the old rate and
the new one, as claimed by appellant. When the new rate was establish-
ed, the necessity for the injunction was removed.

The decree was correct and will be affirmed.

Decree affirmed.

Decided by the Appellate Court of the Third District July 2, 1925,
Gen. No. 7878, April Term, 1925. The increased rates filed by the
applicant were not removed by the Public Utilities Commission until
July 27, 1925, and did not go into effect until August 1, 1925.
Until the new rates went into force and effect, applicant was not
liable for their payment and therefore applicant was not indebted to
applicant in the amount of the difference between the old rate and
the new one, as claimed by applicant. When the new rate was established,
of the necessity for the injunction was removed.
The decree was correct and will be affirmed.

STATE OF ILLINOIS, { ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 6th day of
Sept in the year of our Lord one thousand
nine hundred and twenty-two

Justus L. Johnson
Clerk of the Appellate Court.



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1080

2281A. 650

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present—The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG 5 1922 the opinion of
 the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Joseph F. Faber,

Appellant,

vs.

Appeal from Peoria

Charles A. Kimmel, et al,

Appellee,

Partlow, J.

On July 21, 1919, appellant, Joseph F. Faber, and Elizabeth Clarke in her own right and as executrix under the will of her husband, Samuel M. Clarke, who died in 1916, filed their bill in the circuit court of Peoria county against appellees, Charles A. Kimmel, Mary R. Franklin, E. J. Galbraith, as administrator of the estate of Luke Sweetser, and others, in which they sought partition and to remove certain clouds upon the title to land which they claimed to own. This suit was consolidated with a prior proceeding commenced by Mary R. Franklin. Answers, cross-bills and supplemental bills were filed. The cause was referred to a master who heard the evidence and recommended a decree partly in accordance with the prayer of the original bill and partly in accordance with the prayer of the cross-bill. Exceptions to the report were overruled, a decree was entered in conformity with the recommendations of the master and from that decree this appeal was prosecuted.

On July 15, 1908, Joseph F. Faber, Samuel M. Clarke and Luke Sweetser entered into a written contract for the purchase, and sale for speculative purposes, of a tract of land near the city of Peoria, known as the "Bush tract." The contract provided that the property was to be conveyed to Faber for the benefit of himself and Clarke who were to furnish the money, and that Sweetser was to handle it under the directions of Faber and Clarke. The title was to remain in Faber for the benefit of all parties concerned, and Sweetser was to look after the sale of the property, but Sweetser was to have no interest in the property, except he was to have

2221 A. 650

Joseph T. Faber,

Appellant,

vs.

Charles L. Kanner, et al.,

Respondents.

Berkeley, 7.

On July 21, 1919, appellant, Joseph T. Faber, and respondents

Clark in her own right and as executrix under the will of her husband,

Samuel M. Clark, who died in 1916, filed their bill in the circuit court of Berrie county against respondents, Charles L. Kanner, et al.,

Mary R. Franklin, et al. The bill, as administrator of the estate

of Luke Sweetser, and others, in which they sought partition and to

remove certain clouds upon the title to land which they claimed to

own. This suit was consolidated with a prior proceeding commenced

by Mary R. Franklin, answers, cross-bills and supplemental bills

were filed. The case was referred to a master who heard the evidence

and recommended a decree partly in accordance with the prayer of the

original bill and partly in accordance with the prayer of the

cross-bill. Exceptions to the report were overruled, a decree was

entered in conformity with the recommendations of the master and

from that decree this appeal was prosecuted.

On July 15, 1908, Joseph T. Faber, Samuel M. Clark and

Luke Sweetser entered into a written contract for the purchase, and

sale for speculative purposes, of a tract of land near the city of

Berrie, known as the "Brush tract." The contract provided that the

property was to be conveyed to Faber for the benefit of himself and

Clark who were to furnish the money, and that Sweetser was to hand-

le it under the direction of Faber and Clark. The title was to

remain in Faber for the benefit of all parties concerned, and

Sweetser was to look after the sale of the property, but Sweetser

was to have no interest in the property, except as was to have

one-third of the profits, after first allowing to Faber and Clarke their money invested with six per cent interest. The contract provided that it might be assigned. Faber and Clarke were financially responsible, while Sweetser was a real estate agent with very little or no property, and he was indebted to various persons in large sums, including the Central National Bank of Georgia. The bank agreed to extend financial assistance to the enterprise, provided it could secure an assignment of Sweetser's interest therein as security for Sweetser's indebtedness to the bank. On the day the contract was executed Sweetser, with the consent of Faber and Clarke, made an assignment of his interest in the contract to the bank to secure his indebtedness to the bank, amounting to about \$6,000.00. The business was carried on under the contract for about six years, and during that time a considerable portion of the "Bush tract" was sold and otherwise disposed of. On June 24, 1914, the balance of the "Bush tract" was exchanged for property in the city of Chicago, commonly known as "The Evergreen Apartments," subject to a mortgage of \$95,000.00 on the Chicago property. On June 30, 1914, the parties entered into a supplemental contract which provided that the "Bush tract" should be superseded by the Chicago property; that it was the intent and purpose of the supplemental contract to explain the joint ownership of the two principal parties to the property acquired in Chicago in lieu of the "Bush tract"; that the interest of Sweetser in the Chicago property, and the other assets of the joint ownership, should remain as provided in the original contract.

At the time of the assignment of the contract of July 15, 1908, to the Central National Bank, Sweetser's indebtedness to the bank consisted of three notes, one for \$4500.00, one for \$1500.00, and a third for \$75.00. The last two notes were signed by W. H. Franklin as security. Shortly after July 15, 1908, Franklin died, leaving these two notes unpaid. The Franklin estate was settled and the title to all of his person^{al} property was vested in his widow, Mary R. Franklin. During the administration of the estate, Mary R. Franklin paid these two notes to the bank and became subrogated

one-third of the profits, after first allowing to Weber and Glickman their money invested with six per cent interest. The contract provided that it might be assigned. Weber and Glickman were financially responsible, while Sweetser was a real estate agent with very little or no property, and he was indebted to various persons in large sums, including the Central National Bank of Chicago. The bank agreed to extend financial assistance to the enterprise, provided it could secure an assignment of Sweetser's interest therein as security for Sweetser's indebtedness to the bank. On the day the contract was executed Sweetser, with the consent of Weber and Glickman, made an assignment of his interest in the contract to the bank to secure his indebtedness to the bank, amounting to about \$2,000.00. The bank then was carried on under the contract for about six years, and during that time a considerable portion of the "Brush tract" was sold and otherwise disposed of. On June 22, 1914, the balance of the "Brush tract" was exchanged for property in the city of Chicago, commonly known as "the Overgreen Apartments", subject to a mortgage of \$25,000.00 on the Chicago property. On June 30, 1914, the parties entered into a supplemental contract which provided that the "Brush tract" should be superseded by the Chicago property; that it was the intent and purpose of the supplemental contract to explain the joint ownership of the two principal parties to the property acquired in Chicago in lieu of the "Brush tract"; that the interest of Sweetser in the Chicago property, and the other assets of the joint ownership, should remain as provided in the original contract. At the time of the assignment of the contract of July 15, 1908, to the Central National Bank, Sweetser's indebtedness to the bank consisted of three notes, one for \$4500.00, one for \$1500.00, and a third for \$75.00. The last two notes were signed by W. E. Franklin as security. Shortly after July 15, 1908, Franklin died, leaving these two notes unpaid. The Franklin estate was settled and the title to all of his personal property was vested in his widow, Mary R. Franklin. During the administration of the estate, Mary R. Franklin paid these two notes to the bank and became substituted

to the security hold by the bank by the assignment to the bank of Sweetser's share in the contract, subject to the right of the bank to hold the contract as security for the payment of the \$4500.00 note until it was finally satisfied. On June 29, 1909, Sweetser, with the knowledge and consent of Faber and Clarke, executed to Mary R. Franklin an assignment, under seal, of his interest in the contract of July 15, 1908, which recited the previous assignment to him to the bank, and that a part of the debt secured by the bank assignment consisted of the \$1500.00 note and the \$75.00 note, for which W. H. Franklin was security and which notes had been paid by his estate; that Sweetser owed W. H. Franklin two other notes, one for \$100.00 and another for \$300.00; all of which notes were secured by the assignment of June 29, 1909, from Sweetser to Mary R. Franklin.

On June 12, 1912, appellee, Charles A. Kimmel, obtained a judgment in the circuit court of Cook county against Sweetser for \$9353.15. Execution was issued, directed to the sheriff of Cook county, and on July 20, 1914, there was a levy and sale under the execution, of Sweetser's interest in the Chicago property, and a sheriff's certificate of purchase was issued to a man by the name of Rogers, but this certificate subsequently came into the possession of Charles A. Kimmel. Kimmel filed a creditor's bill against Faber, Clarke and Sweetser, but this suit was settled on April 27, 1915, by Sweetser entering into a written assignment with Kimmel which recited the judgment, levy and sale, and the assignment to Kimmel of Sweetser's interest in the Chicago property under his contract with Faber and Clarke, which assignment from Sweetser to Kimmel was filed for record in the recorder's office of Cook county on May 14, 1915.

On April 8, 1915, Sweetser further assigned his interest in the contract with Faber and Clarke to Willert I. Glemons, to secure an indebtedness of \$850.00. Glemons subsequently died and the administrator of his estate was a party to the subsequent proceedings in this case. There was also another assignment of this contract to Leonard Hillis to secure \$5000.00.

On January 23, 1913, Mary R. Franklin filed her bill in the circuit court of Peoria county, in which she sought to subject Sweetser's interest in the "Bush tract" to the payment of her claim. On January 11, 1917, she filed a supplemental bill, setting up the exchange of the "Bush tract" for the Chicago property and praying to subject the Chicago property to the payment of the balance due her. At the May term, 1918, she filed a second supplemental bill, reciting the assignment of the contract to Slemmons.

In 1916, Clarke died, and on July 21, 1919, Faber and Mrs. Clarke filed the bill in this case, making parties defendant all of the persons to whom Sweetser had assigned his interest in the original contract, setting up substantially the facts above recited and alleging that Sweetser had no interest in the property that he could assign or transfer; that he was insolvent; that he was unfaithful to the trust reposed in him by Faber and Clarke; that they took the management of the property away from him, and Faber afterward managed it without expense or cost; that Sweetser died in 1919 in great poverty and that Ernest J. Galbraith was his administrator; that the proceedings taken by Kimmel beclouded the title to the Chicago property and that the cloud should be removed and the property be declared to belong to Faber and Clarke.

On September 11, 1919, Mary R. Franklin filed a cross-bill in the suit of Faber and Clarke, setting out practically the matter referred to in her previous bill; and praying that the parties be compelled to account to her for the value of Sweetser's interest in the Chicago property. On the same day she filed an answer to the original bill of Faber and Clarke, admitting the original contract, the trade of the Bush property for the Chicago property, but alleging that the exchange was made without her consent and knowledge, and denying that the complainants were entitled to the relief prayed for in their bill. An answer was filed by appellee, Kimmel, and he filed a cross-bill.

On September 1, 1919, Faber purchased for \$750.00 the \$6,000.00 note held by the Central National Bank against Sweetser, and he

On January 25, 1913, Mary R. Franklin filed her bill in the circuit court of Deoria county, in which she sought to subject Sweetser's interest in the "Bush tract" to the payment of her claim. On January 11, 1914, she filed a supplemental bill, setting up the exchange of the "Bush tract" for the Chicago property and praying to subject the Chicago property to the payment of the balance due her. At the May term, 1915, she filed a second supplemental bill, reciting the assignment of the contract to themselves. In 1915, Clarke died, and on July 23, 1915, Haber and Clark. Clarke filed the bill in this case, making certain amendments all of the persons to whom Sweetser had assigned his interests in the original contract, setting up substantially the facts above recited and alleging that Sweetser had no interest in the property that he could assign or transfer; that he was insolvent; that he was indebted to the first respondent in his life; that they took the management of the property away from him, and later effected a managed it without expense or cost; that Sweetser died in 1913 in that the proceedings taken by himself becometh the title to the Chicago property and that the court should be removed and the property be declared to belong to Haber and Clarke. On September 11, 1915, Mary R. Franklin filed a cross-bill in the suit of Haber and Clarke, setting out practically the matter referred to in her previous bill; and praying that the parties be compelled to account to her for the value of Sweetser's interest in the Chicago property. On the same day she filed an answer to the original bill of Haber and Clarke, admitting the original contract, the trade of the Bush property for the Chicago property, but alleging that the exchange was made without her consent and knowledge, and denying that the commitments were entitled to the relief prayed for in their bill. An answer was filed by appellee, himself, and he filed a cross-bill. On September 1, 1915, Haber purchased for \$750.00 the \$2,000.00 note held by the Central National Bank against Sweetser, and he

claimed that by the purchase he became entitled, as against Sweetser, to the proceeds, except that Mary R. Franklin had a prior lien thereon in the sum of \$1575.00 on the two notes due from Sweetser to W. H. Franklin, with interest at six percent from date.

By order of the court the bills filed by Mary R. Franklin were consolidated with the bill filed by Faber and Clarke. Issues were joined on the original bill, the amended bill, supplemental bill, and cross-bills, and the cause was referred to the master. On June 3, 1921, the master made his report, finding the facts as above recited relative to the contracts between Faber, Clarke and Sweetser and the assignments of Sweetser's interest to the various parties. The report recommended that the Chicago property be sold subject to the mortgage encumbrance, and from the proceeds there should first be paid to Mary R. Franklin the full amount of all obligations owing her by Sweetser; that there should next be paid to Faber and the proper representatives of Clarke, all sums which might be owing to them, including the \$750.00 paid by Faber to the Central National Bank as purchase money of the \$6,000.00 note; that upon an accounting being had, the amount of profits should be ascertained and determined, and apportioned between Faber, Clarke and Sweetser under the original agreement, and the portion belonging to Sweetser should be paid, after the payment to Mary R. Franklin, to the administrator of the Slemons estate, and if any was left, it was to be paid to Kimmel to the extent of his indebtedness, and any balance to the estate of Sweetser. Exceptions were overruled to the master's report and a decree was entered substantially as found by the master, and from that decree this appeal was prosecuted.

Before considering the errors assigned, we desire to say that the abstract and briefs filed in this case violate rules 16 and 17 of this court. There is no complete statement of facts as required in rule 17. Each party has merely stated the facts relative to his own assignment of error, and has not seen fit to give us a clear statement of all the facts. The nearest statement we can find is in the report of the master, which consists of nineteen pages, and

alimony that by the purchase he became entitled, as against Westcott, to the proceeds, except that Mary A. Franklin had a prior lien thereon in the sum of \$150.00 on the two notes due from Westcott to W. H. Franklin, with interest at six percent from date. By order of the court the bills filed by Mary A. Franklin were consolidated with the bill filed by Labor and Clarke. Labor and Clarke were joined on the original bill, the amended bill, supplemental bill, and cross-bills, and the cause was referred to the master. On June 3, 1911, the master made his report, finding the facts as above recited relative to the contracts between Labor, Clarke and Westcott and the assignments of Westcott's interest to the various parties. The report recommended that the Chicago property be sold subject to the mortgage encumbrance, and that the proceeds thereof should first be paid to Mary A. Franklin the full amount of all obligations owing her by Westcott; that there should next be paid to Labor and the proper representatives of Clarke, all sums which might be owing to them, including the \$150.00 paid by Labor to the Central National Bank as purchase money of the \$3,000.00 note; that upon an accounting being had, the amount of profits should be ascertained and determined, and apportioned between Labor, Clarke and Westcott under the original agreement, and the portion belonging to Westcott should be paid, after the payment to Mary A. Franklin, to the administrator of the Richmond estate, and if any was left, it was to be paid to him to the extent of his indebtedness, and any balance to the estate of Westcott. Exceptions were overruled to the master's report and a decree was entered substantially as found by the master, and from that decree this appeal was prosecuted. Before considering the errors assigned, we desire to say that the abstract and bills filed in this case violate rules 15 and 16 of this court. There is no complete statement of facts as required in rule 15. Each party has merely stated the facts relative to his own assignment of error, and has not even tried to give us a clear statement of all the facts. The master's statement we can find in the report of the master, which consists of nineteen pages, and

has been abstracted into three pages. The record contains 192 pages, and there are 102 pages of evidence abstracted into three and one-half pages. The decree does not appear in the abstract, but counsel have contented themselves by merely stating that the decree, in substance, follows the report of the master. It was the duty of the appellant to make a clear and concise statement of all of the facts, giving the form of the action, the substance of the pleadings, the material facts, how the issues were decided, and what errors are relied upon to reverse the judgment. There should be a sufficient history of the case to show what questions of law or fact are submitted for decision, and the abstract should have been sufficient to fully present every error assigned. The failure of counsel to properly abstract the record and to state the facts, has entailed upon this court a vast amount of unnecessary labor which the court should not have been called upon to perform, and because of the condition of the abstract and briefs, we would be fully justified in affirming the decree without any consideration of the errors assigned. We have, however, attempted to state the facts and to arrive at a proper conclusion.

The appeal from this decree is prosecuted by Joseph F. Faber, and Elizabeth Clarke does not join in the appeal. The only error assigned by Faber is that the court improperly decreed that Mary R. Franklin had a first lien upon the proceeds of sale to the extent of her claim. Cross-errors have been assigned by appellee Kimmel in which he claims that the court erred in holding that his assignment from Sweetser was subject to the rights of all the other parties to the suit. Appellant, on page one of his brief, says "that the appeal by Faber brings up for review but a single question, and that a legal one, as there is no controverted fact in the case, and but a single error is assigned by him, although it is twice stated."

The decree makes specific findings of fact and as they stand undisputed they are very material to the determination of the errors assigned. The decree recites the facts substantially as we have

has been abstracted into three pages. The record contains 292 pages, and there are 102 pages of evidence abstracted into three pages, and one-half page. The record does not appear in the abstract, but counsel have contented themselves by merely stating that the record, in substance, follows the report of the master. It was the duty of the appellant to make a clear and concise statement of all of the facts, giving the form of the action, the substance of the pleadings, the material facts, how the issues were decided, and what errors are relied upon to reverse the judgment. There should be a sufficient history of the case to show what questions of law or fact are admitted for decision, and the abstract should have been sufficient to fully present every error assigned. The failure of counsel to properly abstract the record and to state the facts has entailed upon this court a vast amount of unnecessary labor which the court should not have been called upon to perform, and because of the condition of the abstract and briefs, we would be fully justified in affirming the decree without any consideration of the errors assigned. We have, however, attempted to state the facts and to arrive at a proper conclusion.

The appeal from this decree is prosecuted by Joseph E. Fisher, and Elizabeth Clark does not join in the appeal. The only error assigned by Fisher is that the court improperly decreed that Mary E. Franklin had a first lien upon the proceeds of sale of the extent of her claim. Gross errors have been assigned by appellee in which he claims that the court erred in holding that his assignment from Sweetser was subject to the rights of all the other parties to the suit. Appellant, on page one of his brief, says "that the appeal by Fisher brings up for review but a single question, and that a legal one, as there is no controverted fact in the case, and but a single error is assigned by him, although it is twice

The decree makes specific findings of fact and as they stand undisputed they are very material to the determination of the error assigned. The decree recites the facts substantially as we have

above stated them. It finds that the two contracts between Faber, Clarke and Sweetser did not create a partnership, but that their relationship was in the nature of a partnership, and that the rules governing partnerships are applicable in the case; that the real estate belonged to Faber and Clarke in fee in equal shares, and Sweetser had no interest in the real estate but was entitled to a one-third of the net profits; that Faber held the title in trust under the contract; that the contract related to one specific and well defined adventure, namely, the sale of the "Bush tract", for money or time sales, and did not contemplate the exchange of that land for other land or chattel property, and did not provide for other adventures in other real estate; that the assignments by Sweetser vested in the assignees full power and authority to enforce their rights as assignees in their own name the same as Sweetser might have done before the assignments; that by paying the two notes Mary R. Franklin became subrogated to the rights of the bank under its assignment from Sweetser; that by the exchange of the "Bush tract" for the Chicago property, the contract of July 13, 1918, was terminated at a profit of \$111,285.00, and that Sweetser's share of that profit was sufficient to pay his entire indebtedness to the Central National Bank and to Mary R. Franklin, and that said indebtedness could and should have been paid; that this exchange was made without the knowledge or consent of the bank or Mrs. Franklin, and was not ratified by either of them, and this act by Faber, Clarke and Sweetser amounted to a transfer of the balance of the "Bush tract" to their own use, contrary to the rights of the bank and Mrs. Franklin, and thereby Clarke and Sweetser became, in equity, personally bound to pay the bank and Mrs. Franklin their indebtedness secured by their assignments; that the assignment to Slemmons was after the exchange of the properties and his interest was subject to the assignment to the bank and Mrs. Franklin, and covered both contracts between Faber, Clarke and Sweetser; that the execution and sale by Kimmel was a cloud on the title to the Chicago property for the reason that Sweetser had no title therein subject to levy and

also stated them. It finds that the two contracts between Weber, Clark and Sweetser did not create a partnership, but that their relationship was in the nature of a partnership, and that the rules governing partnerships are applicable in the case; that the real estate belonged to Weber and Clark in fee in equal shares, and Sweetser had no interest in the real estate but was entitled to a one-third of the net profits; that Weber held the title in trust under the contract; that the contract related to one parcel and well defined interests, namely, the right to the land, the money or time sales, and did not constitute the exchange of that land for other land or chattel property, and did not create for other advantages in other real estate; that the assignments of Sweetser vested in the assignees full power and authority to enforce their rights as assignees in their own name the same as Sweetser might have done before the assignments; that by paying the two notes Mary E. Franklin became subrogated to the rights of the bank under its assignment from Sweetser; that by the exchange of the "Buck tract" for the Chicago property, the contract of July 10, 1918, was terminated at a profit of \$111,000.00, and that Sweetser's share of that profit was entitled to pay his entire indebtedness to the Central National Bank and to Mary E. Franklin, and that said indebtedness could and should have been paid; that this exchange was made without the knowledge or consent of the bank or Mrs. Franklin, and was not ratified by either of them, and this act by Weber, Clark and Sweetser amounted to a transfer of the balance of the "Buck tract" to their own use, contrary to the rights of the bank, and Mrs. Franklin, and thereby Clark and Sweetser became, in equity, personally bound to pay the bank and Mrs. Franklin their indebtedness secured by their assignments; that the assignment to Sherman was after the exchange of the properties and his interest was subject to the assignment to the bank and Mrs. Franklin, and covered both contracts between Weber, Clark and Sweetser; that the execution and sale by Kimmel was a cloud on the title to the Chicago property for the reason that Sweetser had no title therein subject to levy and

sale, and the assignment by Sweetser to Kimmel was subject to the prior assignments; that the note of \$4500.00, due from Sweetser to the Central National Bank, was exchanged for a note for \$6000.00 on March 30, 1913, and that on September 1, 1919, this \$6000.00 note was purchased by Faber from the bank for \$750.00, and was assigned without recourse, and that Faber was entitled to repayment of this \$750.00 as against all parties except Mrs. Franklin; that by the death of Clarke and Sweetser the contract relative to the joint adventure terminated at the option of any of the parties, and that each party had the right to have the remaining property sold and the money distributed; that there should be a sale of the Chicago property and an accounting of the partnership affairs; that Mary R. Franklin was first entitled to payment of all her claim; that second there should be paid to Elizabeth Clarke and to Faber, the amounts due them, including to each one-third of the net proceeds, and including to Faber the \$750.00 paid to the bank for the \$6000.00 note; that out of the one-third share to Sweetser, the Slemmons estate should next be paid, and any remaining should be paid to Kimmel to the extent of his claim, and the balance, if any, to the heirs of Sweetser.

Appellant contends that Sweetser could not transfer to Mrs. Franklin a larger or different interest than he himself had at the time of the assignment. She was fully acquainted with the fact that the contract could be assigned so that if an assignment nullified it, or in any way impaired it, or change it fundamentally, then Mrs. Franklin acquired nothing by her assignment, as the bank was its first assignee and was the sole owner thereof to the extent of its claim; that Mrs. Franklin never paid anything to the bank in satisfaction of its claim against this fund.

With all of the facts in the decree admitted we do not think the contention of appellant can be sustained. The original contract, before the trade had been consummated, was assigned to the bank and to Mrs. Franklin, with the knowledge and consent of Faber and Clarke. By its assignment, the bank became interested in the contract to the

and the assignment by Sweetser to Kimball was subject to the
prior assignments; that the note of \$4500.00, due from Sweetser
to the Central National Bank, was exchanged for a note for \$6000.00
on March 20, 1901, and that on December 1, 1901, said \$6000.00
note was purchased by Feder from the bank for \$750.00, and was
assigned without recourse, and that Feder was entitled to repayment
of this \$750.00 as against all parties except Mrs. Franklin; that
by the death of Clarke and Sweetser the contract relative to the
joint adventure terminated at the option of any of the parties, and
that each party had the right to have the remaining property sold
and the money distributed; that there should be a sale of the
Chicago property and an accounting of the partnership affairs; that
Mary R. Franklin was first entitled to payment of all her claim;
that second there should be paid to Elizabeth Clarke and to Feder,
the amounts due them, including to each one-third of the net pro-
ceeds, and including to Feder the \$750.00 paid to the bank for the
\$6000.00 note; that out of the one-third share to Sweetser, the
Illinois estate should next be paid, and any remaining should be
paid to Kimball to the extent of his claim, and the balance, if any,
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was the first assignee and was the sole owner interested to the extent
of its claim; that Mrs. Franklin never paid anything to the bank
in satisfaction of its claim against this fund.

With all of the facts in the record admitted we do not think
the contention of appellant can be sustained. The original contract,
before the trade had been consummated, was assigned to the bank and
to Mrs. Franklin, with the knowledge and consent of Feder and Clarke,
its assignment, the bank became interested in the contract to the

extent of its claim, to be paid out of Sweetser's share of the property. If there had been no profits, the assignment would have been of no value to the bank. If the profits of Sweetser were sufficient to pay the bank, then any balance of such profits belonged to Mary R. Franklin to the extent of her claim. This was the legal status of the parties at the time of the exchange of the properties. If there had been no change in the property, this legal status would have continued and been controlling. A trust must be executed according to and within its terms. Where beneficiaries have been expressly provided for in a trust such beneficiary must consent to any changes in the trust before such changes are binding on the beneficiaries. *Morgan vs. Clayton*, 61 Ill. 35.

The decree found that the exchange of the property was made without the knowledge, consent or ratification of the assignee, and that this exchange amounted to a transfer to their own use of the balance of the "Bush tract" by Faber and Clarke, and they thereby became personally liable for the amount due the bank and Mrs. Franklin. It also found that the trade was consummated at a profit of \$111,285.00, an amount sufficient to pay the entire indebtedness of Sweetser to the bank and to Mrs. Franklin, and that the indebtedness could and should have been paid. These facts are undisputed and no exception was taken to them, and we think the decree giving to Mary R. Franklin a priority is in accordance with the law and the facts. *Dicus vs. Scherer*, 277 Ill. 168. The Chicago property was subject to a mortgage of \$95,000.00 as against a \$30,000.00 mortgage on the "Bush tract". The bank and Mrs. Franklin were under no obligations to subject their security to a debt of this size without their knowledge and consent, and if Faber and Clarke saw fit to trade without the knowledge and consent of the assignees, such act amounted to a transfer of the balance of the "Bush tract" to their own private use. And inasmuch as the trade yielded a large profit they became personally liable to the bank and to Mrs. Franklin to the extent of the indebtedness due them. The bank and Mrs. Franklin were not required to follow their claim into the Chicago property, or to assume any

liability with reference thereto. On the other hand, if the exchange was made at a profit of \$111,285.00, which is not disputed, then the share of Sweetser was sufficient to pay both claims, and appellant is not injured by the decree, which gives Mrs. Franklin the priority.

If these conditions had continued to exist, the bank would have had the first claim out of the Sweetser share and Mrs. Franklin would have had the second claim. The conditions, however, were changed by the action of Faber and the bank. On January 23, 1913, Mrs. Franklin filed her bill to enforce her lien. On March 30, 1913, the bank took a new note from Sweetser for \$6000.00 in lieu of the \$4500.00 note secured by its assignment. The original assignment of Sweetser to the bank could not cover at least \$1500.00 of the last note because the assignment to Mrs. Franklin was prior to it. The decree found, and it is not controverted, that the original assignment to the bank was made to secure the \$4500.00 note, the \$1500.00 note and the \$75.00 note. When the \$6000.00 renewal note was given on March 30, 1913, there was no change made in the original assignment to the bank. It was not expressly made to cover the new note, but the new note was substituted for the old one. The conditions were again changed on September 1, 1919, when Faber purchased from the bank the \$6000.00 note for \$750.00 and it was transferred to him by the bank without recourse. Why a note of that size was sold for such a small sum does not appear from the evidence, but if the parties had considered that it was amply secured by the assignment to the bank, the latter would probably not have parted with it for about one-tenth of its value. From a consideration of the undisputed evidence, we think the chancellor was right in decreeing that Mary R. Franklin had a first lien on the share of Sweetser, and in decreeing that Faber and Clarke were personally liable to the extent of her claim.

We do not think the decree erroneously held that the claim of appellee Kimmel was subject to the claims of all of the other assignees. Kimmel's judgment was obtained on January 15, 1912, after the properties had been exchanged. In October, 1914, an

liability with reference thereto. On the other hand, if the exchange was made at a profit of \$111,826.00, which is not stated, then the agents of Westover was entitled to pay both claims, and especially as not injured by the decree, which gives Mrs. Franklin the priority. If these conditions had continued to exist, the bank would have had the first claim out of the Westover share and Mrs. Franklin would have had the second claim. The conditions, however, were changed by the action of Fader and the bank. On January 22, 1913, the bank took a new note from Westover for \$3000.00 in lieu of the \$4500.00 note secured by its assignment. The original assignment of Westover to the bank could not cover at least \$1500.00 of the last note because the assignment to Mrs. Franklin was prior to it. The decree found, and it is not controverted, that the original assignment to the bank was made to secure the \$4500.00 note, the \$1500.00 note and the \$750.00 note. When the \$3000.00 renewal note was given on March 20, 1913, there was no change made in the original assignment to the bank. It was not expressly made to cover the new note, but the new note was substituted for the old one. The conditions were again changed on September 1, 1913, when Fader purchased from the bank the \$8000.00 note for \$750.00 and it was transferred to him by the bank without recourse. Why a note of that size was sold for such a small sum does not appear from the evidence, but it is too parties had considered that it was amply secured by the assignment to the bank, the latter still having the first lien on the about one-tenth of its value. From a consideration of the uncontroverted evidence, we think the conclusion was right in deciding that Mrs. Franklin had a first lien on the share of Westover, and in deciding that Fader and Gluck were personally liable to the extent of the share.

We do not think the decree erroneously held that the claim of appellee Kimmel was subject to the claims of all of the other assignees. Kimmel's judgment was obtained on January 14, 1913, after the execution had been exchanged. In October, 1912, an

execution was levied on the Chicago property. The property was sold and a certificate issued to Rogers. A bill was filed by Kimmel against Faber, Clarke and Sweetser to subject the Chicago property to the payment of his debt, and that suit was settled on April 25, 1915, by an assignment by Sweetser to Kimmel of the former's interest in the contracts. The decree found, and it is not disputed, that Sweetser had no fee simple interest in the Chicago property subject to levy and sale, and the decree cancelled the certificate of purchase as a cloud on the title. The correctness of this conclusion is not only apparent from the evidence, but it was recognized by Kimmel when he took the assignment of the contract in lieu of a certificate of purchase which he claimed was a lien on Sweetser's share of the Chicago property. The assignment from Sweetser to Kimmel was the basis of his claim to a share in the funds and his assignment was subject to all the other assignments.

We find no reversible error, and the decree will be affirmed.

Decree affirmed.

execution was given on the Chicago branch. The Chicago branch was told
 that a certificate issued to Chicago. Bill was killed by Chicago
 against the Chicago branch and Chicago was ordered to subject the Chicago branch
 to the payment of the bill, and that bill was subject to the Chicago
 bill, by an assignment of Chicago to Chicago of the Chicago branch
 subject to the Chicago branch. The Chicago branch was told to subject
 that Chicago branch was no longer subject to the Chicago branch
 subject to the Chicago branch, and the Chicago branch was subject to the Chicago branch
 of Chicago as a subject to the Chicago branch. The Chicago branch of the Chicago branch
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 subject to the Chicago branch. The Chicago branch of the Chicago branch
 subject was the subject of the Chicago branch in the Chicago branch and the
 assignment was subject to the Chicago branch of the Chicago branch.

Chicago branch

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court.
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof.
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-

Clerk of the Appellate Court.

7085

228 T. 650

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present—The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on **AUG 5 1922** the opinion of
the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Alonzo C. Bass, for the use of
Frank R. Mercer and Lewis H.
Mercer,

appellees,

2261A. 650

vs.

The Malden Elevator Company,
a corporation,

appeal from Bureau

Virginia M. Gillham, intervening
petitioner,

Appellant,

Hartlow, J.

On October 7, 1916, appellees, Frank R. Mercer and Lewis H. Mercer, obtained a judgment in the circuit court of Bureau county against Alonzo C. Bass for \$5066.86. Execution was issued on the judgment and returned "no property found." On November 30, 1920, The Malden Elevator Company, a corporation, was summoned in garnishment and on January 7, 1921, answered that it had in its possession 1147 bushels and 58 pounds of corn worth \$1.70 per bushel, amounting to \$1951.66, belonging to Alonzo C. Bass, which corn was delivered on May 29, 1919, and that it was advised that Virginia M. Gillham of Upper Alton, Illinois, claimed the money involved in this cause. Virginia M. Gillham filed a plea as intervening petitioner, in which she alleged that she was the owner of the corn and the proceeds of the sale thereof. Issue was joined, there was a trial by jury, the issues were found in favor of the appellees, Frank R. Mercer and Lewis H. Mercer, judgment was rendered upon the verdict, and from that judgment Virginia M. Gillham has appealed. The only grounds for reversal urged are that the verdict is not sustained by the evidence and that there were erroneous rulings on instructions.

The evidence shows that on May 1, 1903, Alonzo C. Bass executed and delivered to Levi L. Mercer two promissory notes, one for \$1100.00 due in five years, and one for \$1200.00, due in six years. Levi L. Mercer died and the notes were sold to Frank R. Mercer and Lewis H. Mercer. The notes were not paid when due, and judgment for \$5066.86

Alonso G. Hernandez, for the use of
Frank A. Hernandez and Louis A.
Hernandez.

SS 861 A. 650

100

The Alamosa River Company,
a corporation,

Virginia E. Williams, Intervenor,
Petitioner.

Verdict, 1.

On October 7, 1931, respondent, Frank A. Hernandez and Louis A.
Hernandez, obtained a judgment in the district court of New Mexico
against Alonso G. Hernandez for \$2000.00. The judgment was entered on the
7th day of October, 1931. On November 30, 1931,
the Alamosa River Company, a corporation, was appointed as trustee
and on January 7, 1932, answered that it was in the possession of
the property and the proceeds of same worth \$1100.00 and that it
was willing to pay the same to Alonso G. Hernandez, which sum was delivered on
May 12, 1932, and that it was advised that Virginia E. Williams
was the owner of the same. Williams, claimed the same proceeds in this case.
Virginia E. Williams filed a petition for intervention in which
she alleged that she was the owner of the sum and the proceeds of
the same. There was a trial on May 12, 1932, and
the jury found in favor of the respondent, Frank A. Hernandez and
Louis A. Hernandez. Judgment was rendered upon the verdict and the
sum of \$1100.00 was paid to the respondent. The only evidence
presented was that the verdict is not sustained by the evidence
and that there were erroneous rulings on instructions.
The evidence shows that on May 1, 1932, Alonso G. Hernandez
and delivered to Mrs. E. Hernandez two promissory notes, one for \$1000.00
due in five years, and one for \$1000.00, due in six years. Mrs.
Hernandez died and the notes were sold to Frank A. Hernandez and Louis
Hernandez. The notes were sold to Frank A. Hernandez and Louis

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was rendered upon them in the circuit court of Bureau county on October 7, 1916. It was upon this judgment that the foreclosure proceedings were based.

Alonzo C. Bass was the owner of a life estate in one hundred ninety-six acres of land in Berlin township, Bureau county, including five lots in the village of Eldon, which were adjacent to the farm land. On August 2, 1907, Bass executed and delivered to the appellant a quit claim deed, conveying his interest in the one hundred ninety-six acres, but not including the lots. On the same date Bass and appellant entered into a written contract which provided that this conveyance was not a deed, but was a mortgage to secure a loan of \$5,000.00 made, at that time, by appellant to Bass, evidenced by three notes, payable \$1,000.00 in two years, 1,000.00 in three years, and \$1,000.00 in four years. As a further security Bass assigned a \$5,000.00 life insurance policy to appellant, subject to a loan thereon of \$500.00. Bass agreed to pay the premium on the insurance policy, but gave appellant the right to pay the same in case of default, in which event Bass was to owe the amount so paid in addition to the loan. Bass was to have the use of the farm and all the rents and profits the same as though no deed had been made, and he was to pay all taxes and assessments, with the privilege to appellant to pay the same in case of default, in which event Bass was to owe her the additional amount so paid. If Bass failed to make any of these payments, appellant had the right to terminate the contract and the deed was to become absolute as to the oil and minerals underlying the land, which were reserved in the deed. Bass, in case of default, was to forfeit all payments made, and appellant was to be entitled to immediate possession. Upon payment of the different notes appellant was to reconvey to Bass, free of any encumbrance or loan.

On August 28, 1907, a supplemental contract was entered into between Bass and appellant, giving Bass the privilege of paying the entire indebtedness on any interest paying note by paying a premium of three months interest in advance, upon which payment appellant

was to reconvey the land. On August 16, 1909, Bass could not pay the first \$1,000.00 note, and another contract was entered into extending the time of payment for one year, and to secure this payment Bass assigned leases on the land, which were to be returned to him upon the payment of the first \$1,000.00 note. On December 30, 1909, Bass and appellant made another contract, ratifying all previous contracts, and substituting a \$4,000.00 life insurance policy for the \$6,000.00 policy, as provided in the original contract, and Bass agreed to assign existing leases on the premises if he failed to make the payment due in August, 1910. On July 28, 1910, Bass executed to appellant a bill of sale, conveying a horse, cow, sled, harness, saddles, and all the personal property consisting of household furniture, tools, and dishes, located in the house on the farm, which bill of sale was filed for record. On the same date Bass conveyed to appellant the five lots in Malden, together with twenty-three lots in Pullman, Cook county, subject to an incumbrance for \$6866.67. The stated consideration for the chattel property was \$200.00; for the Malden lots \$400.00, and for the Pullman lots \$800.00.

The deed and all of the contracts between Bass and appellant were drawn by Charles F. Vogel, an attorney of Chicago, and the deed was left with him by appellant for safe keeping, with instructions not to record it until appellant instructed him so to do. Bass failed to pay the taxes in June, 1908, and a tax deed was issued in August, 1910. On June 29, 1910, Vogel filed the Bass deed for record and later redeemed the land from tax sale, paying \$385.00 on one tract and \$66.41 on the other tract. After the deed was recorded it was returned to Vogel and remained in his possession. On the same day the deed was recorded, appellant returned to Bass the three notes for \$1,000.00 each. Some of them had been paid, and Bass had only paid interest thereon for two years. At that time it was verbally agreed that Bass would give up all right, title and interest in the land covered by the deed. Immediately after July 29, 1910, Vogel took charge of all the property as the agent of appellant, but Bass was to manage

one to twenty five dollars. On March 1st, 1902, and could not pay
the first \$1,000.00 note, and another account was opened later
extending the time of payment for one year, and so on until the
payment of the account on the 1st. After that he paid
to him upon the payment of the first \$1,000.00 note. On December
1st, 1902, there was a settlement with another account, making a
previous account, and receiving a \$4,000.00 like account
policy for the \$4,000.00 policy, and received in the policy com-
mission, and then agreed to supply another account on the payment of
he failed to make the payment for the year, 1902, on July 1st,
1902, then entered to settlement with of said company, and
and, also, received, and all the account was settled com-
ing of household furniture, books, and other, received in the name
on the 1st, which bill of sale was then and received on the 1st
date was conveyed to applicant the first time in 1902, together
with twenty-five dollars in cash, and account, which was in the
amount for \$400.00. The account was then for the first
property was \$400.00; for the balance was \$400.00, and for the
balance was \$400.00.

The deed and all of the account, and the account
was done by Charles H. Jones, an attorney at law, and the
deed was kept with the applicant's law office, and the
attorney was to record it with the county recorder, and to
do. Jones failed to pay the money on June, 1902, and a new deed
was made by Charles H. Jones, on June 1st, 1902, and the
deed was for \$400.00 and later received the same from the same
attorney, \$400.00 on one deed and \$400.00 on the other deed. The
deed was recorded it was returned to Jones and recorded in his
possession. On the same day the same was recorded, and the
returned to Jones the first time for \$1,000.00 and the second
time had been paid, and Jones had only paid interest thereon for
two years. At that time it was verbally agreed that Jones would
give up all right, title and interest in the land covered by the
deed. Immediately after this, on July 1st, 1902, Jones had charge of the

the farm as assistant to Vogel, and as compensation therefor was to have the partial use of one of the dwelling houses on the farm. Bass, in the leases executed from time to time, reserved the land where the house stood, containing about one and two-thirds acres. In the lease of July 9, 1909, for the year beginning March 1, 1910, the tenant agreed to keep certain live stock on the farm without expense to Bass, and to milk a cow belonging to Bass and deliver the milk to Bass. There were other provisions in the lease with reference to cutting ice, taking care of the chickens and furnishing eggs.

There is a dispute as to the manner in which the leases were signed from 1910 to 1920. It is claimed by appellant that up to the time of the commencement of this suit in 1919, Vogel signed all of the leases with the exception of three which covered the period from March 1, 1917, to March 1, 1920, which were signed by Bass, as agent of appellant. Appellees claim that each of these three leases was signed by Bass individually and not as agent. It is also claimed by appellees and there is evidence tending to show that the lease dated July 6, 1918, and covering the period from March 1, 1919 to March 1, 1920, was first signed by Bass, and that after the garnishment summons was served in this case, that Bass went to the house of Storm, the tenant, and got from his wife this lease and took it away, and it was afterwards returned through the mail, and when it came back it was signed by Virginia E. Gillham, by Charles E. Vogel, her attorney. These three leases have been certified to this court for our inspection, and each of them is signed by Bass, but after his name, in each instance, appears in indistinct scrawl, which on close inspection seems to be the letters "agt".

Prior to August, 1916, appellant's share of the grain was sold in Chicago and handled by Vogel. On August 20, 1916, Bass sold to the Malden Elevator Company, 590 bushels of oats at sixty-two cents a bushel, amounting to \$465.80 and received in payment a check payable to himself. There is evidence, however, on behalf of appellant that the proceeds of this check were turned over to appellant. On May 24, 1919, Bass sold the corn in question in this case. It came

[illegible]

off of this farm and was raised in 1918. R. A. Ewing, the manager of the Malden Elevator Company, testified that he purchased the corn of Bass, and that shortly after the garnishee summons was served, Bass came to the elevator, there were several people inside, and he waited until they were gone, when he came into the office and asked for the money due for the corn, but Ewing refused to pay it because of the garnishee summons.

The material question in this case is whether the facts above recited were sufficient to justify the verdict of the jury. Fraud will not be presumed, but the burden of proving fraud is on the party who alleges it, and it must be proven by such clear and convincing evidence as to leave the mind well satisfied that the allegations of fraud are true. *Shinn vs. Shinn*, 91 Ill. 477. *Gillespie vs. Fulton Oil and Gas Company*, 236 Ill. 189; *Carter vs. Carter* 283 Ill. 324. If the motive and designs of persons charged with fraud and collusion may be traced to an honest and legitimate source equally as well as to a corrupt one, the honest source must be preferred. *McKennan vs. Mickelberry*, 242 Ill. 117. *Wolf vs. Lawrence*, 276 Ill. 11.

The original deed to appellant was dated August 2, 1907, and the garnishee summons was issued November 30, 1920. The time between these dates, under the evidence, can be divided into three periods. The first one is from August 2, 1907, the date the deed was executed, to July 29, 1910, the date the deed was filed for record, during which time the undisputed evidence very strongly tends to show that the relation of mortgagor and mortgagee existed between Bass and appellant. During these three years Bass was the owner of the fee and had merely conveyed it to appellant as security for a debt of \$3,000.00, for money which it is not disputed appellant had loaned to Bass. Bass had full charge and control of the land during these three years and handled it as his own as he had a right to do, and what he did during that period does not show that there was any fraudulent transfer made for the purpose of defrauding appellees, except as the events of this period are considered in the light of other events. The second period is from July 29, 1910,

off of this farm and was raised in 1918. W. L. DeLong, the manager
of the Maiden Elevator Company, testified that he purchased the
corn of Bass, and that shortly after the furnished summons was
served, Bass came to the elevator, there were several people inside,
and he waited until they were gone, when he came into the office
and asked for the money but not the corn, but DeLong refused to pay
it because of the furnished summons.

The material question in this case is whether the above above
testimony was sufficient to justify the verdict of the jury. There
will not be presumed, but the burden of proving fraud is on the
party who alleges it, and it must be proven by such clear and con-
vincing evidence as to leave the mind well satisfied that the al-
legations of fraud are true. *Union vs. Union, 12 Ill. 417, 418-419*
pie vs. Union Oil and Gas Company, 236 Ill. 182; Carter vs. Carter
288 Ill. 324. If the motive and designs of persons charged with
fraud and collusion may be traced to an honest and legitimate source
equally as well as to a corrupt one, the honest source must be con-
sidered. *Wickham vs. Wickham, 236 Ill. 217, 218 vs. Lawrence,*
236 Ill. 11.

The original deed to appellant was dated August 2, 1907,
and the furnished summons was issued November 30, 1907. The time
between these dates, under the evidence, can be divided into
periods. The first one is from August 2, 1907, to June 28, 1910,
was executed, to July 28, 1910, the date the deed was filed for
record, during which time the undisputed evidence very strongly
tends to show that the relation of mortgage and mortgagee existed
between Bass and appellant. During those three years Bass was the
owner of the fee and had merely conveyed it to appellant as security
for a debt of \$2,000.00, for money which is not disputed ap-
parent had loaned to Bass. Bass had full charge and control of the
land during these three years and he sold it as his own as he has
right to do, and what he did during that period does not show that
there was any fraudulent transfer made for the purpose of defraud-
ing appellees, except as the events of this period are considered in
the light of other events. The second period is from July 28, 1910,

until August, 1916. The evidence shows that Bass defaulted in his payment of the first \$1,000.00 note after the time had been extended, and on July 29, 1910, the deed was filed for record, and the relation of mortgagor and mortgagee between Bass and the appellant ceased, and from that time the appellant claimed to own the property in fee simple. Through her agent she assumed charge of the property, rented it, collected the rents, made repairs, sold the grain, paid the taxes, and handled it as her own. Strict accounts were kept of all the receipts and expenditures, and statements of account were rendered to appellant from time to time by her agents. This continued until August, 1916, and during those six years there is very little evidence tending to show that the transfer was fraudulent. If the business had been transacted after 1916 as it was before that time the evidence would not be sufficient to sustain the verdict. The third period is from 1916 to 1919, when the garnishee summons was issued. It is contended by the appellees that during these three years Bass became more and more careless. He thought all danger was passed and he could transact the business more in the open than he had previously done. He thought he would not be bothered by his creditors and the system of accounting was not carried out as it had been before that time. He signed some of the leases in his own name; he received checks for the cash rent; he sold the grain in his own name, and the money was paid to him. Most of the transactions upon which appellees base their right of recovery took place after 1916, and they constitute practically the only evidence upon which the claim of appellees is based.

It is uncontradicted that the dealings between appellant and Bass began with a legitimate transaction, in which appellant loaned Bass \$3,000.00 and took a deed in the nature of a mortgage as security. At that time the Mercer notes had been in existence for over four years and were unpaid. The evidence does not show why the deed was not immediately placed on record. Appellant did not place it on record for three years, during which time both of the Mercer notes became due. The last Mercer note was due one year before the deed was placed on record. During those three years,

until August, 1916. The evidence shows that from October in
his payment of the \$1,000.00 note after the time his term
expired, and on July 27, 1916, the bank was paid for the
and the relation of conspiracy and conspiracy between him and the
appellant ceased, and from that time the appellant claimed to own
the property in the mine. Through her agent the appellant charged
of the property, tested it, collected the rents, made repairs, sold
the grain, paid the taxes, and located it as her own. During
accountant would keep for all the receipts and expenditures, and every-
month of account were rendered to appellant from time to time by
her agents. This continued until March, 1916, and shortly thereafter
six years there is very little evidence leading to show that the
franchise was transferred. All the business had been transacted after
1916 and it was before that time the evidence would not be sufficient
to sustain the verdict. The trial court in December 1916, when
the franchise was taken was correct. It is contended by the appellant
that during these years some money was paid to the appellant.
He thought all money was made and he could account for the business
made in the year from his own pocket. He thought he would
not be required to pay anything and he paid no money to the appellant
and nothing was paid to him from the time that time. He thought that
the money in his own hands; he received money for the coal mine;
he sold the grain in his own hands, and the money was paid to him.
None of the transactions were made which would show that there was
recovery took place after 1916, and they considered themselves as
only evidence upon which the claim of appellant is based.
It is undisputed that the relation between appellant and
himself with a legitimate business in which appellant owned
that he had a share in the mine is in fact a conspiracy to
control. It is true that the mine was not in appellant's
ever four years and was profitable. The evidence does not show that
the fact was not necessarily shown to be a conspiracy. The fact
there is no reason for the verdict, which is a conspiracy to
control the mine. The fact shows that the mine was not in
control of the mine. The fact shows that the mine was not in

if the Mercer notes had been reduced to judgment, the judgment would have been a lien on the land prior to the deed to the appellant. No steps were taken, however, to place the Mercer notes in judgment until October 7, 1916, or over seven years after they were due. The garnishee summons was not issued until four years after the judgment. The deed to appellee had been in existence for thirteen years before the garnishee summons, and had been on record for over ten years, during which time appellant had claimed to own the property. Her deed was not only on record, but it was well understood in the neighborhood that she owned the real estate, that the occupants were her tenants, and that the premises were in charge of her agents. It is also undisputed that she paid an income tax to the United States government on the basis of the income from this farm. It is claimed by the appellees that the amount for which the appellant secured the farm was a small percent of its value. Bass only owned a life estate and what that life estate was worth was problematical, depending upon the number of years which he would live.

There are some very suspicious circumstances in this evidence. Some strange things were done on both sides, and it is hard to understand why they were done. However, if there were no suspicious circumstances, or there was no evidence tending to support appellees' claim, there would be no cause of action and no suit. The question is whether these suspicious circumstances and the peculiar deals between the parties were sufficient to sustain the verdict. This is an action at law and the only question directly at issue is the ownership of the corn or the proceeds of the sale, but the title to the real estate is indirectly involved. If appellant was the owner of the land, it necessarily follows that she was the owner of the corn. A deed of conveyance, properly executed, delivered and recorded cannot be set aside by mere suspicious circumstances, or by evidence of a doubtful character, but it can only be disturbed by evidence of the clearest and most convincing character. The security of title to all real estate demands that a deed of conveyance shall be upon a firm foundation and shall not be disturbed by extrinsic evidence unless that evidence clearly and conclusively establishes

if the latter notes had been returned to judgment, the judgment would have been a lien on the land prior to the date of the appeal. No steps were taken, however, to place the latter notes in judgment until October 7, 1916, or over seven years after they were due. The garnished summons was not issued until four years after the judgment. The deed to appellee had been in existence for thirteen years before the garnished summons, and had been on record for over ten years, during which time appellee had claimed to own the property. Her deed was not only on record, but it was well understood in the neighborhood that she owned the real estate, that the co-defendants were her tenants, and that the amounts were in charge of her agents. It is also undisputed that she paid an income tax to the United States Government on the basis of the income from this farm. It is claimed by the appellee that the amount for which the appellee secured the farm was a small amount at its value. That only owned a life estate and that this life estate was worth very problematical, depending upon the number of years which it would live. There are some very suspicious circumstances in this evidence. Some strange things were done on both sides, and it is hard to understand why they were done. However, it there were no suspicious circumstances, or there was no evidence tending to support appellee's claim, there would be no cause of action and no suit. The question is whether these suspicious circumstances and the peculiar facts between the parties were sufficient to sustain the verdict. This is an action at law and the only question directly at issue is the ownership of the corn or the proceeds of the sale, but the title to the real estate is indirectly involved. If appellee was the owner of the land, it necessarily follows that she was the owner of the corn. A deed of conveyance, properly executed, delivered and recorded cannot be set aside by mere suspicious circumstances, or by evidence of a doubtful character, but it can only be disturbed by evidence of the clearest and most convincing character. Therefore, of title to all real estate demands that a deed of conveyance shall be upon a firm foundation and shall not be disturbed by extrinsic evidence unless that evidence clearly and conclusively establishes

the right to have the deed disturbed. The most that can be said of the evidence on behalf of appellees is that it shows that appellant had never seen the farm but once, and that, before the time she claims to have purchased it; that she was never on the farm thereafter; that she never personally managed it or looked after it; that the instruments above mentioned were drawn by Vogel, who had before that time been the attorney of Bass, and that she was taken to Vogel's office by Bass to have the original deed drawn; that after she obtained the deed she did not file it for record for several years; that the leases were executed on behalf of the landlord by Vogel or by Bass; that they, or one of them, looked after the sales of the crops, made the repairs necessary to be made on the farm and attended to the business generally. We are of the opinion that on account of the long and uninterrupted title and possession of the appellant, the delay of the appellees in enforcing their claim, and in view of all the facts and circumstances in this case, that the evidence was not sufficient to justify the verdict of the jury.

The ninth instruction given on behalf of appellees was not erroneous because it failed to define a colorable title. The eleventh instruction refused on behalf of appellant was properly refused because it failed to state that appellant was rightfully in possession of the land. The twelfth and thirteenth were properly refused because they omitted the element of good faith, the question of the rights of other creditors and the value of the property. The fourteenth and fifteenth were properly refused because the question of the rights of other creditors and the value of the property were omitted. We think the seventeenth instruction refused stated a correct proposition of law and should have been given.

For the reasons indicated the judgment will be reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 6th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty-two

Justus L. Johnson
Clerk of the Appellate Court.

7089

226 L.A. 351

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

present—The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

AUG 5 1922

the opinion of

the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Charles F. Sippel,

Appellee,

vs.

Henry Lauer and Lizzie Lauer,

Appellants,

Partlow, J.

226 I.A. 651

Appeal from Whiteside

Appellee, Charles F. Sippel, took judgment by confession in the circuit court of Whiteside county against appellants, Henry Lauer and Lizzie Lauer, his wife, upon a note given for a premium on a life insurance policy. Execution was issued and placed in the hands of the sheriff, whereupon appellants made a motion to open the judgment, which motion was allowed. Appellants filed the general issue and a special plea setting up fraud and circumvention in securing the note. There was a trial by jury and a verdict for the appellee for \$859.30, the full amount of the note and interest. Judgment was rendered upon the verdict and this appeal was prosecuted.

The first ground of reversal urged is that the verdict is contrary to the evidence. The evidence shows that Henry Lauer is a farmer living eight miles south of Prophetstown, in Henry county. In February, 1921, he wrote to the Illinois Life Insurance Company of Chicago and requested information about its ~~XXX~~ XX insurance policy. Appellee was the agent of the company residing at Tampico, Illinois, and the letter was sent to him. Appellee went to Lauer's house and found him in bed with a broken leg. There was a conversation relative to the policy, but there is a dispute as to what was said. Lauer testified that appellee said the policy would be a \$20,000.00 policy to be paid for in ten annual payments of \$200.00 each, and that it would mature in twenty years, and would have a cash surrender value of \$20,000.00 at the end of that time, and that \$20,000.00 would be paid in the event of Lauer's death within twenty years. Appellee testified that he told Lauer that the policy was a \$10,000.00, twenty year, paid up policy, but in case of death it

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appealing from the judgment

vs.

Partlow, T.

Appellee, Charles F. Bishop, took judgment by confession in

the circuit court of Whiteside county against appellee, Henry
Bishop and Jessie James, his wife, upon a note given by James
on a life insurance policy. Appellee, James, was found and placed in the
hands of the sheriff, whereas appellee said it could be upon
the judgment, which motion was allowed. Appellee filed the
general issue and a special plea setting out facts and circumstances
in support of the note. There was a trial of fact and a verdict for
the appellee for \$250.00, the full amount of the note and interest.
Judgment was rendered upon the verdict and this appeal was presented.
The first ground of reversal urged is that the verdict is con-

trary to the evidence. The evidence shows that James is a
man living eight miles south of Rockport, in Whiteside county.
In February, 1921, he wrote to the Illinois Life Insurance Company
of Chicago and requested information about the new life insurance
policy. Appellee was the agent of the company residing at Rockport,
Illinois, and the latter was sent to him. Appellee went to James's
house and found him in bed with a broken leg. There was a conversa-
tion relative to the policy, but there is a dispute as to what was
said. James testified that appellee said the policy would be

\$50,000.00 policy to be paid for in ten annual payments of \$500.00
each, and that it would mature in twenty years, and would have a
cash surrender value of \$50,000.00 at the end of that time, and that
\$50,000.00 would be paid in the event of James's death. Appellee
testified that he told James that the policy would be paid for in
twenty years, paid no policy, but in case of death it

gave a protection of \$20,000.00 for the first five years, \$15,000.00 for the next five years, and \$10,000.00 for the last ten years; that during the first five years the annual premium would be \$825.20, the second five years the annual premium would be \$710.80, and the last ten years the annual premium would be \$557.30. Lauer was fifty-five years old April 16, 1921, and appellee testified that from his rate book he figured the premium, told Lauer what it would be, and after some discussion Lauer said he would take the policy. A written application was prepared by appellee. Lauer, without reading this application, signed it and executed a note for \$825.20, the first year's premium, which note was dated February 18, 1921, was due July 18, 1921, and was also signed by Lizzie Lauer, who was the wife of Henry Lauer. The policy was delivered May 24, 1921. The note was not paid when due and appellee and his son went to see Lauer about the payment. There was some talk between them, but they do not agree as to what was said. Lauer testified that he told appellee that the policy delivered was not the policy which he purchased; that he did not have the money to pay the note, and that he would not pay it because appellee had misrepresented the policy; that appellee refused to take back the policy; that appellee agreed to extend the time of payment of the note for thirty days, provided the company would agree to it. Lauer also testified that about two weeks after the policy was delivered, his son came to his house from Peoria, and Lauer then learned for the first time that the policy delivered was not the one which he had purchased. Appellee testified that on account of Lauer having a broken leg the policy was not delivered until May 24; that appellee visited Lauer twice after the application was taken and before the policy was issued, for the purpose of ascertaining his physical condition, and when it was certain there would be a complete recovery from the broken leg, the policy was delivered; that appellee, accompanied by his son, went to Lauer's house to collect the note some time after July 18, 1921. At that time Lauer made no complaint as to the policy or the note, but said he could not pay, at that time, because he could not get teams to haul his corn, and he asked for an extension of

gave a protection of \$30,000.00 for the first five years, \$15,000.00 for the next five years, and \$10,000.00 for the last ten years; that during the first five years the annual premium would be \$225.00, the second five years the annual premium would be \$110.00, and the last ten years the annual premium would be \$55.00. Lamer was fifty-five years old April 16, 1921, and applied testified that from his rate book he figured the premium, told Lamer what it would be, and after some discussion Lamer said he would take the policy. A written application was prepared by appellee. Lamer, without reading this application, signed it and executed a note for \$225.00, the first year's premium, which note was dated February 16, 1921, was due July 16, 1921, and was also signed by Maria Lamer, who was the wife of Henry Lamer. The policy was delivered May 24, 1921. The note was not paid when due and appellee said his son went to see Lamer about the payment. There was some talk between them, but they do not agree as to what was said. Lamer testified that he told appellee that the policy delivered was not the policy which he purchased; that he did not have the money to pay the note, and that he would not pay it because appellee had misrepresented the policy; that appellee refused to take back the policy; that appellee agreed to extend the time of payment of the note for thirty days, provided the company would agree to it. Lamer also testified that about two weeks after the policy was delivered, his son came to his house from Peoria, and Lamer then learned for the first time that the policy delivered was not the one which he had purchased. Appellee testified that on account of Lamer having a broken leg the policy was not delivered until May 24; that appellee visited Lamer twice after the application was taken and before the policy was issued, for the purpose of ascertaining his physical condition, and when it was certain there would be a complete recovery from the broken leg, the policy was delivered; that appellee, accompanied by his son, went to Lamer's house to collect the note some time after July 16, 1921. At that time Lamer made no complaint as to the policy or the note, but said he could not pay, at that time, because he could not get some to haul his corn, and he called for an extension of

thirty days, and said he would pay the note as soon as he got his return from his corn. Appellee testified that he went to see Lauer again at the end of thirty days, and Lauer then said he had not received his returns from his corn; that he had written the company and when he heard from them he would have his returns and settle for the note, and that he would bring the money to appellee. Appellee testified that Lauer did not bring the money to him, and that appellee went to his house a third time but did not meet Lauer, but had a conversation with Mrs. Lauer, who said that they did not have the money.

This is substantially all of the material evidence as to the kind of a policy to be delivered and what was said and done at the various times when the payment on the note was demanded. Lauer in his testimony is corroborated by his wife, while appellee is corroborated by his son. The policy delivered was the policy provided for in the written application. The contention is that the written application does not contain the terms agreed upon by the parties. The application was prepared in the presence of Lauer, and after it was prepared it was handed to him to sign. He was a German, fifty-five years old, and had been in this country for forty years. He could write, he was a man of some property and of considerable business experience. It was his duty to read the application and inform himself of its contents. *Anderson vs. Warne*, 71 Ill. 20; *Swannell vs. Watson*, 71 Ill. 456; *Fulford vs. Block*, 8 Ill. App. 284; *Strong vs. Linington*, 8 Ill. App. 436; *Wilcox vs. Tetherington*, 103 Ill. App. 404. When he failed to do so, but blindly signed it, he will not be permitted to avoid the terms of the application and policy by merely saying that those terms were not in accordance with his prior conversation with the appellee. The presumption of law is that the application is the real contract between the parties, and the burden is upon the appellants to prove the fraud and circumvention alleged in their special plea. *Wright vs. Grover*, 27 Ill. 426; *Boies vs. Henney*, 32 Ill. 130; *Bowden vs. Bowden*, 75 Ill. 143; *Schroeder vs. Walsh*, 120 Ill. 403; *Shinn vs. Shinn*, 91 Ill.

thirty days, and said he would pay the note as soon as he got his return from his corn. Appellee testified that he went to New London again at the end of thirty days, and later then said he had not received his return from his corn; that he had written the company and when he heard from them he would have his return and settle for the note, and that he would bring the money to Appellee. Appellee testified that Lanier did not bring the money to him, and that Appellee went to his house a third time but did not meet Lanier, but had a conversation with Mrs. Lanier, who said that she did not have the money.

This is substantially all of the material evidence as to the kind of a policy to be delivered and what was said and done at the various times when the payment on the note was demanded. Lanier's testimony is corroborated by his wife, while Appellee is corroborated by his son. The policy delivered was the policy provided for in the written application. The contention is that the written application does not contain the terms agreed upon by the parties. The application was prepared in the presence of Lanier, and after it was prepared it was handed to him to sign. He was a German, fifty-five years old, and had been in this country for forty years. He could write, he was a man of some property and of considerable business experience. It was his duty to read the application and inform himself of its contents. *Johnson vs. Watson*, 71 Ill. 486; *Gammell vs. Watson*, 71 Ill. 486; *Ward vs. Birch*, 3 Ill. 486; *Strong vs. Livingston*, 3 Ill. 486; *Wilson vs. Wetherington*, 103 Ill. 404. When he failed to do so, and blindly signed it, he will not be permitted to avoid the terms of the application and policy by merely saying that these terms were not in accordance with his prior conversation with the police. The presumption of law is that the application is the real contract between the parties, and the burden is upon the appellants to prove the fraud and other matters alleged in their special plea. *Bright vs. Grover*, 37 Ill. 486; *Reiss vs. Kenney*, 32 Ill. 130; *Howden vs. Howden*, 75 Ill. 142; *Schneberger vs. Walsh*, 180 Ill. 408; *Shim vs. Shim*, 21 Ill.

477. The policy was admitted in evidence, and upon its face, in clear bold type, is stated the amount of the policy, and the premium to be paid for the first five years, the second five years and the last ten years, and these payments are in accordance with the provisions of the application. It is not even necessary to read the policy in order to gain this information relative to the amount to be paid under the policy during the various terms, or the amount of premium to be paid, but a mere glance at the outside of the policy gives all of this information, which covers all of the questions in dispute in this case. Lauer, who could read and write, testified that he had this policy in his possession for two weeks, until his son came home, before he knew that it was not the kind of policy he claimed he had contracted for. Whether there was any fraud or circumvention on the part of the appellee, as alleged in the special plea, was a question of fact for the jury, and this court is not at liberty to disturb that finding unless we can say that the verdict is against the manifest weight of the evidence. *Bishop vs. Buessee* 69 Ill. 403; *Wiggins Ferry Co. vs. Higgins*, 72 Ill. 517; *People vs. Cassidy*, 283 Ill. 398. We cannot say that the verdict is against the evidence, but on the contrary we think the verdict is in accordance with the weight of the evidence.

On the back of the note is the endorsement "Pay to the order of C. F. Sippel for collection on account of Illinois Life Ins. Co." Appellants contend that this endorsement was not sufficient to transfer the title to appellee so that he could maintain this suit in his own name. We have searched the record carefully to find where this question was raised in the trial court, and have been unable to find any place where the question was there presented. The question was not raised by the special plea or otherwise. When the note was offered in evidence appellant "objected to this note on the ground that there is a want of consideration, that is all the objection we have." If the appellants desired to question the sufficiency of the endorsement, they should have done so in a proper manner in the trial court. If that had been done, the

question would have been saved for review, and if the trial court had held that the endorsement did not transfer the title to appellee, amendments could have been made and a new party plaintiff could have been substituted, if necessary. Appellants not only did not object on this ground, but only objected on the ground that there was no consideration, and expressly declared that there was no other objection. In addition to this, appellee testified that he advanced to the company the first year's premium represented by the note, and the title to the note was in him and the note was his property. Appellants are in no position, at this time, to question appellee's title to the note, and the evidence made out a prima facie case that the note was the property of the appellee.

No instructions were offered by the appellee, but five were offered by the appellant, all of which were refused, and their refusal is assigned as error. All of these instructions are on the question of fraud, they are abstract propositions of law and contain statements which are indefinite and uncertain, and contain terms which the jury might not understand. There was but one specific element of fraud set up in the special plea. The instructions offered should have been limited to the specific fraud alleged and should not have been applicable to fraud in general. For these reasons the instructions were properly refused.

We find no reversible error, and the judgment will be affirmed.

Judgment affirmed.

[illegible]

STATE OF ILLINOIS, { ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT. in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 6th day of
Sept. in the year of our Lord one thousand
nine hundred and twenty-two

Justus L. Johnson
Clerk of the Appellate Court.

7015

22814.451

AT A TERM OF THE APPELLATE COURT,

gun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

esent—The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG 5 1922 the opinion of
 e Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



Lem Noice and Thomas Parker,

226 L.A. 681

Appellees,

vs.

Appeal from Grundy

Mark T. Welsh,

Appellant,

Partlow, J.

Appellees, Lem Noice and Thomas Parker, brought suit against appellant, Mark T. Welsh, before a justice of the peace in Grundy county to recover money due for threshing grain. There was a trial by jury, verdict for \$155.31, and an appeal to the circuit court. In the circuit court there was a trial by jury, verdict for \$170.83, judgment on the verdict, and this appeal was prosecuted.

The evidence shows the appellees were the owners and operators of a threshing machine, and from 1915 to 1919, inclusive, threshed grain for a number of farmers in Grundy county, including appellant. From 1915 to 1917, inclusive, the price charged was two cents per bushel for oats and four cents per bushel for wheat. In the summer of 1919, during the war, the public food administrator called a meeting of all the owners of threshing machines in that neighborhood to consider the question of the best methods to be pursued in threshing the grain. This meeting was held at Morris, in Grundy county, in the latter part of June, and was attended by the appellees. At that meeting the question of the prices to be charged was discussed in connection with the scarcity of labor and the high prices necessary to be paid. After the meeting had adjourned, the evidence, shows that the two appellees met the appellant and told him and others that the price for threshing, during 1918, would remain as it had been during previous years, but that if the prices kept up they would be compelled to charge more after 1918. The threshing for 1918 was done by the appellees at the old price, and was paid for by the appellant. Nothing

Dem Noyce and Thomas Parker,

Appellees,

vs.

Mark T. Welsh,

Appellant,

Partlow, J.

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further seems to have been said about an increase in price until the threshing for 1919 had been completed, when the appellees demanded three cents per bushel for oats and six cents per bushel for wheat, which the appellant and several of his neighbors refused to pay. On the trial before the justice appellant tendered \$117.99. This was in payment for 2799 bushels of oats at two cents, 1189 bushels of wheat at four cents, and \$14.45 costs. The judgment was rendered on the basis of three cents for oats, six cents for wheat, together with interest on the amount due.

Exhibit 1, which was the statement of account of appellees against appellant for 1919, was admitted in evidence, and objection is made because the evidence does not show that it was a book of original entry, and because the evidence does show it was made on August 2, 1918, one year before the threshing was done. The exhibit is dated August 2, 1919, and it is apparent appellee, Noice, was mistaken when he testified it was made on August 2, 1918, but this testimony is not material. The exhibit showed there were 2799 bushels of oats and 1189 bushels of wheat which were figured at three cents and six cents, respectively, and the total amount of the bill was shown. This exhibit was entirely immaterial for the reason that the tender of the appellant made before the justice admitted there were 2799 bushels of oats and 1189 bushels of wheat threshed during the season of 1919. All that exhibit 1 showed was the number of bushels threshed, and as this was admitted there was no injury to appellant even though exhibit 1 was not properly identified and was improperly admitted in evidence.

Appellant contends that the court improperly permitted the appellees to testify that they lost money at the old price charged in 1918; that the court improperly permitted witnesses to testify they did not hear of any threshing for less than three and six cents per bushel in 1919; and improperly permitted the justice of the peace, before whom the case was tried, to testify that he inquired the price paid north of Morris, in 1919, before he gave judgment in the case. The court excluded the answer of the

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appellees with reference to losing money during the previous season, and no error can be assigned on that account. All of the rest of the evidence complained of was proper, for the reason that it was admitted for the purpose of establishing the usual and customary price, in that neighborhood, during the season of 1919. There was no continuing contract between the appellant and the appellees from year to year. The fact that the same price had been paid for several years prior to 1919 did not fix that as the price which was to be paid during 1919. No price was agreed upon covering the year 1919, and there is evidence in the record tending to show that in the summer of 1918 the appellant was informed that the price would probably be increased in 1919, if wages continued as high as they had been in 1918. Under these circumstances, there being no price agreed upon, the appellees were entitled to prove what the services were fairly and reasonably worth in the neighborhood in which the threshing was done. These witnesses testified to the usual and customary prices in that neighborhood during 1919, and that they had heard of no grain being threshed for less than three cents and six cents in that neighborhood. The evidence was for that reason proper. Appellant insists that there was no evidence offered as to the usual and customary price charged for like work in that locality during the season of 1919, but with this contention we cannot agree.

Appellant contends that the statements of appellees to appellant, after the threshers' meeting of 1919, justified the appellant in believing the old prices would prevail until notice of an increase was given; that appellees did not announce the increase until after the 1919 threshing was done for the reason that they knew they would not be permitted to do the work at an increased price; that appellees admitted that no notice of the increase was given, and on account of these facts appellees were estopped from claiming the increase. This position is not sustained by the evidence. There was no contract from year to year. Each year's work was a separate and distinct undertaking. There was ample

appeals with reference to losing money during the previous

season, and no error can be assigned on that account. All of the

rest of the evidence complained of was proper, for the reason that

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nary price, in that neighborhood during the season of 1919.

There was no continuing contract between the appellant and the

appellees from year to year. The fact that the same price had been

paid for several years prior to 1919 did not fix that as the price

which was to be paid during 1919. No price was raised upon cover-

ing the year 1919, and there is evidence in the record tending to

show that in the summer of 1918 the appellant was informed that the

price would probably be increased in 1919, if wages continued as

high as they had been in 1918. Under these circumstances, there

being no other evidence, the appellees were entitled to pay

what the services were fairly and reasonably worth in the neighbor-

hood in which the threshing was done. These witnesses testified

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and that they had heard of no grain being threshed for less than

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claiming the increase. This position is not sustained by the

evidence. There was no contract from year to year. Each year's

work was a separate and distinct undertaking. There was no

evidence to justify the jury in believing that in 1918 appellees told appellant if prices kept up there would have to be a raise in 1919. Appellant knew that on account of the war there was a scarcity in labor and an increase in wages, and it was just as much his duty to ask appellees for their 1919 prices as it was for appellees to tell him there would be an increase. The work was done without any price being agreed upon, and therefore appellant was required to pay what was the usual and customary price for labor of that kind in the immediate neighborhood, and the appellees were not estopped from claiming the increased price.

Complaint is made of the first, fourth, fifth and sixth instructions for appellees. We have considered every objection urged, but do not deem it necessary to set out the instructions and the specific objection to each. The most that can be said against these instructions is that they do not specifically confine the instruction to the evidence in the case. The instructions are not absolutely accurate and could have been more definitely and clearly drawn, but upon a consideration of all of the instructions given on both sides we think the jury was not misled to the injury of the appellant.

The amount involved in this case is not very large, and while it appears that similar cases are pending involving the same questions here presented, and for that reason this case is of more than usual importance, yet we are of the opinion that substantial justice has been done and that the judgment is in accordance with the law and the evidence in the case, and for these reasons will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 6th day of
Sept in the year of our Lord one thousand
nine hundred and twenty-two

Justus L. Johnson
Clerk of the Appellate Court.

2267A. 651

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present—The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on AUG 11 the opinion of
the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Independent Harvester Company,
a corporation,

226 I.A. 1007

Appellee,

vs.

Appeal from La Salle

T. F. Gomisky,

Appellant.

Partlow, J.

Appellee, the Independent Harvester Company, obtained a judgment by default in the circuit court of La Salle County against appellant, T. F. Gomisky, for \$7825.54. A motion was made by the appellee to open up the judgment, which motion was denied and an appeal has been prosecuted from that order.

The record shows that the original summons to the March term, 1921, was returned unserved, and an alias summons to the June term was served. The declaration and affidavit of claim were filed more than ten days prior to the first day of the June term. The declaration was on twelve bills of exchange, or trade acceptances, made by appellant to appellee covering transactions for a period of over two years. Appellee was a farm machinery manufacturer and appellant a retail merchant. The amounts of these bills of exchange range from \$94.50 to \$1537.65, making a total with interest of \$7825.54. Three of the bills are dated September 20, 1918, seven are dated January 2, 1920, and two are dated February 22, 1920. Some of them bear endorsements of partial payment made by the appellant. The affidavit of claim attached to the declaration sets out each instrument with the amount due on each and the total amount due. The affidavit of claim was sworn to before A. L. Wiebrandt, a notary public whose official seal attached shows that he was a notary public of Milwaukee, Wisconsin. On June 21, 1921, the court granted to appellant an extension of ten days in which to plead and file an affidavit of meritorious defense, which time was

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J. C. Martinez

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applicant a retail merchant, the amount of these sales of goods

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James Earl Ray, 1928, is now in Alcatraz, California, awaiting trial.

Approved for Release by NSA on 08-25-2013 pursuant to E.O. 13526

subsequently extended, on two occasions, to September 1, 1921. On August 29, 1921, appellant filed the general issue with a notice of set-off, but no affidavit of meritorious defense. On November 10, 1921, a written notice was served on appellant that on November 14, 1921, appellee would move to strike the general issue from the files for want of an affidavit of meritorious defense, and would move for judgment on the affidavit of claim. On November 14, 1921, appellant requested that action on the motion be delayed until November 19, 1921, which was agreed to by appellee. On November 19, 1921, the attorneys for appellant stated they would not appear and resist these motions. On November 19, 1921, appellee made proof of service of notice upon appellant, moved the court to strike the plea and notice thereunder from the files, and the court granted the motion. Appellee then moved for judgment, which was entered. Appellant did not appear at this hearing. On November 21, 1921, appellant had formal exceptions noted to the action of the court in striking the plea and entering judgment. Motions for new trial and in arrest of judgment were made and overruled, and an appeal from the judgment prayed and allowed. On December 20, 1921, the appellant had the order allowing the appeal from the judgment vacated, as well as the motion for a new trial and in arrest of judgment. A motion was then made to vacate the judgment, which motion was not supported by an affidavit showing a meritorious defense or any diligence to prevent the default. The motion to vacate the judgment was overruled and appellant prayed an appeal from that order.

There are four assignments of error; first, that the court erred in overruling appellant's motion for a bill of particulars; second, in striking the plea and notice thereunder from the files; third, in rendering judgment; and fourth, in refusing to set aside and vacate the judgment. It will not be necessary to consider each of these assignments separately, but they will all be considered together.

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of these assignments separately, but they will all be considered

Section 58 of the practice act provides that the court may, in its discretion, before final judgment, set aside a default and may, during the term, set aside any judgment upon good and sufficient cause, upon affidavit, upon such terms and conditions as shall be deemed reasonable. It has been repeatedly held, under this section, that the motion to set aside the judgment must be supported by an affidavit setting forth that the appellant has a meritorious defense in case the judgment is set aside, and showing that due diligence was exercised to prevent the default, and that default was suffered not through the negligence of appellant or his attorney. *Mondell vs. Kimball*, 85 Ill. 592; *Hitchcock vs. Herzer*, 90 Ill. 543; *Walsh vs. Walsh*, 114 Ill. 655; *Plaff vs. Pacific Express Co.*, 251 Ill. 243; *Nitsche vs. City of Chicago*, 280 Ill. 268. The same authorities hold that where a meritorious defense is set up in the affidavit filed in support of the motion to open the judgment, and it appears that the defendant or his attorney was negligent in not presenting such defense, the trial court is not warranted in vacating the judgment. There was no attempt made by appellant to comply with the provisions of the statute or the rules of law applicable to a motion to vacate and set aside a judgment. The motion to set aside the judgment, for all the record shows, was oral, and was not supported by either an affidavit, as required by statute, or by any oral or written evidence. On what ground the motion was made does not appear. This of itself would have been sufficient to have justified the trial court, in the exercise of its discretion, in denying the motion; there being no showing whatever that appellant had any valid defense, or that he had exercised any diligence to prevent the default from being taken against him. Appellant contends that there are cases where judgments have been set aside and the motion was not supported by an affidavit. Several of these are cited in the brief, including *Taylor vs. Coghlan*, 73 Ill. App. 379; *Cooke vs. Haungs*, 118 Ill. App. 501; and *Schaffer vs. Moyer*, 165 Ill. App. 423. These cases are not controlling here for the

reason that in each of them the default was not on account of any omission of the defendant but was on account of defective service, or of some oversight of the court, or because the declaration or bill was defective.

The whole of appellant's contention is based upon the fact that the affidavit of claim was sworn to before a foreign notary with nothing to show his authority to administer the oath, and for that reason the claim of appellee was not sworn to and the trial court improperly struck the plea of appellant from the files. There can be no dispute as to the law relative to affidavits of this kind. When sworn to before a foreign notary with nothing to show his authority they are void as contended by appellant.

Desnoyers Shoe Company vs. First National Bank, 188 Ill. 312;

Bell vs. Farwell, 189 Ill. 414. If that was the only question in this case we would not hesitate to reverse this judgment.

Appellant had a right to waive any and all objections he might see fit to waive. He could, also, by his conduct, place himself in a position where he will not be heard to complain of defects however serious, and that is exactly what he has done in this case. When the declaration was filed, appellant appeared but did not see fit to call the attention of the court to the defective affidavit.

He asked for and was granted three extensions of time to plead.

He was ruled to plead and file an affidavit of meritorious defense by a day certain. On August 29, 1921, almost ninety days after he should have filed his pleas, he filed the general issue unsworn to. He probably failed to swear to his plea because he considered that the affidavit attached to the declaration was defective, but he did not raise that question in any way. On November 10, 1921, a written notice was served on appellant that on November 14, 1921, appellee would move to strike the plea from the files and ask for judgment. Appellant asked for an extension of time on this motion which was granted, and on November 19, 1921, counsel for appellant told counsel for appellee he would not appear and resist the motion, and the plea was stricken. If appellant wanted to question

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He asked for and was granted three extensions of time to plead.
He was tried to plead and filed an affidavit of witnesses defense
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appellee would move to strike the plea from the files and ask for
judgment. Appellant asked for an extension of time on this motion
which was granted, and on November 19, 1921, counsel for appellant
told counsel for appellee he would not appear and resist the
motion, and the plea was stricken. If appellant wanted to question

the sufficiency of the affidavit it was his duty to have resisted the motion to strike his plea from the files by specifically calling the attention of the court to the defect, but he did not do so. Even if the court had known of this defect and considered it fatal, this act of appellant would have misled the court into the belief that appellant had no objection to judgment being entered. A few days later appellant appeared and entered formal objections to the ruling, but even then the attention of the court was not called to the defect. On December 20, appellant again appeared and moved to vacate the judgment, but even in this motion not a word was said about the defective affidavit. The trial court had a right to have all errors specifically pointed out so they could be ruled upon, and corrected, if possible. Nowhere in this record from beginning to the end was the specific objection now relied on for reversal ever called to the attention of the trial court or counsel for appellee. If appellant saw fit to sit idly by throughout the whole proceeding and not call the attention of the trial court to the one serious error now relied upon, he will not be permitted to raise it for the first time in this court. *Prout vs. Lomer*, 39 Ill. 331; *McKenzie vs. Penfield*, 87 Ill. 38; *City of Chicago vs. English*, 198 Ill. 211; *Spencer Turner Co. vs. Schwill*, 195 Ill. App. 432; *First National Bank vs. Gerry*, 195 Ill. App. 513. Upon the showing made by appellant, the trial court properly refused to vacate the judgment, and properly refused a bill of particulars.

A motion has been made by appellee to affirm the judgment with damages, as provided in sections 22 and 23, chapter 33, of the statutes. These sections provide that where the judgment is affirmed, the person prosecuting the appeal shall pay to the opposite party a sum not exceeding ten per cent of the amount of the judgment, provided the court shall be of the opinion that such appeal was prosecuted for delay. It has been held that an appeal will be deemed to have been prosecuted for delay where the reviewing court is merely required to re-state propositions of law previously determined in published opinions. *Town vs. Alexander*, 85 Ill. App. 512,

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the motion to strike his name from the files by specifically call-
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to the one serious error now relied upon, he will not be permitted
to raise it for the first time in this court. *Wright vs. Jones*,
39 Ill. 321; *McKensie vs. Bentland*, 37 Ill. 32; *City of Chicago*
vs. People, 124 Ill. 411; *People vs. People*, 124 Ill. 411;
App. 432; *First National Bank vs. Gentry*, 125 Ill. 444. Upon
the showing made by appellant, the trial court properly refused to
vacate the judgment, and properly refused a bill of particulars.
A motion has been made by appellee to affirm the judgment
with damages, as provided in sections 22 and 23, chapter 38, of the
statutes. These sections provide that where the judgment is affirmed
ed, the person prosecuting the appeal shall pay to the opposite
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court is merely required to re-state propositions of law previously
determined in published opinions. *Town vs. Alexander*, 39 Ill. App. 312.

affirmed 185 Ill. 254. Or where the contentions of counsel are clearly untenable and devoid of merit. Potter vs. Leviton, 199 Ill. 93. Or in cases where a reversal could not reasonably have been hoped for. Calumet Electric Street Railway Co. vs. Lewis, 168 Ill. 249; Grossman vs. Cosgrove, 174 Ill. 382. Or where technical objections without merit are raised. Kraft vs. Auw, 192 Ill. 584. In the case at bar the appeal was only from the order refusing to vacate the judgment. No affidavit was filed in support of this motion as provided by statute. In fact, in the record, no showing of any kind was made in support of this motion, and when the motion was denied this appeal was prosecuted. The real question in the case was never raised in the trial court but was raised for the first time in this court. In this condition of the record the contention of appellant was clearly untenable, a reversal could not reasonably have been expected, and the grounds for reversal urged were technical and without merit. This appeal clearly comes within the statute and damages should be allowed sufficient, at least, to compensate appellee for the additional expense to which it has been put on this appeal. For this reason damages will be allowed in the sum of \$100.00, judgment will be rendered therefor, and execution issued upon the judgment.

We find no reversible error, and the judgment will be affirmed with damages.

Judgment affirmed with damages.

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Appellant has filed a petition for a rehearing in which he contends that the affidavit in question was not filed with the declaration but was filed almost two months later without leave of court and for that reason it was a nullity and should have been disregarded. In support of this position authorities are cited. We have again searched the record for ground in support of this position but have failed to find any place where this defect was called to the attention of the trial court or was made the basis of an objection. Not only was this question not raised in the trial court but it was not urged in this court. The abstract and brief of the appellant contain the statement that the affidavit was filed without leave but that question was not argued in the brief but on page 9 appellant says that it was "unnecessary to argue that feature of the case." Under the authorities cited in the opinion, objections cannot be considered upon appeal unless first raised in the trial court and objections not argued in the court of appeal will be considered as waived. The petition for a rehearing will be denied.

The Court has held that a defendant who is
acquitted of a crime is not liable for a second trial
on the same charge. This principle is known as the
double jeopardy rule. It is based on the Fifth
Amendment to the Constitution, which states that
no person shall be subject to the same offense
more than once. The Court has held that this
protection applies to both federal and state
courts. In the case of a federal conviction,
the defendant is protected from a second trial
in federal court. Similarly, in the case of a
state conviction, the defendant is protected from
a second trial in state court. The Court has
also held that the double jeopardy rule applies
to appeals. If a defendant is acquitted on
appeal, he or she cannot be retried. This
principle is known as the rule against a second
trial after acquittal. The Court has held that
this rule is a fundamental part of the
Constitution. It is based on the Fifth
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The Court has held that this protection applies
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Similarly, in the case of a state conviction,
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STATE OF ILLINOIS, } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court.
SECOND DISTRICT. }
in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-

Clerk of the Appellate Court.

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

MARCH TERM, A. D. 1922

226 I.A. 651

ESTHER P. FISHBEIN,
Appellee.
vs.
JOE SIEGEL,
Appellant.

Appeal from the
City Court of
East St. Louis.

HIGBEE, P. J.

This was a suit brought by appellee in forcible detainer for the possession of certain premises in the City of East St. Louis. A trial before the court without a jury resulted in a judgment in favor of appellee and thereupon appellant entered a motion under Section 17 A of the Forcible Entry and Detainer Act, as amended by an act approved May 3rd, 1921, for a stay of execution. The Court granted the stay of execution upon condition that all rent due up to a date named be paid, and appellant paid the amount specified. Afterwards the Court proceeded to hear evidence concerning the reasonable rental value of the premises in question for the time thereafter, during which the stay of execution should be in force, and upon consideration of the evidence fixed the rental at the sum of Seventy-five dollars a month, commencing from the date of the order. From this order or judgment appellant has appealed to this court, claiming that the sum of seventy-five dollars a month for the rent of the premises is excessive and unreasonable. Three witnesses were heard by the court on this subject, two of whom swore that seventy-five dollars a month was a reasonable rental for the premises, while the other one swore that they were not "worth more" than twenty-five dollars a month.

Under this condition of the proof, the trial judge who heard the testimony of the witnesses and saw them upon the witness stand was fully justified in finding as he did and entering judgment for the larger amount, and we have discovered no reason appearing in the record why that finding should be disturbed.

The judgment of the trial court is accordingly affirmed.

Affirmed.

Not to be reported in full.

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

MARCH TERM, A. D. 1922

HENRY TRIPP,
Defendant in Error,

vs.

THE VILLAGE OF GOREVILLE,
Plaintiff in Error.

226 I.A. 651

Error to
County Court
Johnson County.

BARRY, J.

For several years prior to the accident in question there were hitching racks for the use of the public located on a lot adjoining the premises where the city hall of plaintiff in error stands. The racks were upon the private property of Mr. Nipper and for that reason plaintiff in error paid him rent at \$12.00 per year for several years. Mr. Nipper died Jan. 4, 1918, and the last rent was paid to his widow in June of that year.

The lot was conveyed to J. G. Vaughn on March 20, 1919, and the public continued to use the racks. On May 5, 1919, Mr. Vaughn moved the racks about seven feet to put them on better ground and attempted to fill the holes from which the posts had been removed. Ten days later a son of defendant in error drove the latter's team to town and hitched the same to one of the racks. When starting for home one of the horses stepped into one of the holes from which a post had been removed and received injuries from which he died the following day.

Defendant in error brought suit before a Justice of the Peace and the case was appealed to the County Court where he recovered a verdict for \$96.00. A new trial was granted and he then recovered a verdict for \$106.00 and a motion for new trial was overruled and judgment rendered on the verdict to review which this writ of error was sued out.

The only errors complained of are that the Court should have directed a verdict in favor of plaintiff in error and that the Court erred in giving instructions to the jury on behalf of defendant in error.

It is contended that because there was no evidence that plaintiff in error had constructed the racks in question, nor that it had ever exercised any control over them, the Court should have directed a verdict in its favor. The evidence

shows, clearly, that for several years it paid rent because the racks were on the lot and were used by the public with the full knowledge and consent of plaintiff in error. Its duty, therefore, was the same as if it had constructed the racks upon its own property and had full control thereof. *Gridley vs. Bloomington*, 68 Ill. 47; *Village of Mansfield vs. Moore*, 124 Ill. 133; *Chicago vs. Baker*, 195 Ill. 54; *Roodhouse vs. Christian*, 168 Ill., 137.

The Court did not err in refusing to direct a verdict in favor of plaintiff in error. We have carefully considered all of the instructions given to the jury, and while there are some minor defects in some of these given for defendant in error, yet, they are of such a character that when all of the instructions are considered as a series we find no reversible error. We are of the opinion that the judgment is right and the same is affirmed.

Affirmed.

Not to be reported in full.

Term No. 34.

Agenda No. 15

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

MARCH TERM, A. D. 1922

NATIONAL FIRE INS. CO.,
Appellant.

vs.

JASPER PASSANANTE,
Appellee.

2261 A 352
Appeal from
City Court of
City of DuQuoin.

BARRY, J.

On Sept. 28, 1919, appellant issued to appellee a tornado policy insuring his barber shop furniture, tools and fixtures. About a year later a windstorm removed a portion of the roof of the building in which the property was located and the same was damaged by rain, plaster, etc. Appellee brought suit before a Justice of the Peace and the case was taken to the City Court on appeal, where appellee recovered a verdict and judgment for \$150.00. The Court overruled a motion for new trial and an appeal has been perfected to this Court.

The only assignment of error argued in this court is that the verdict is excessive. For that reason all other alleged errors are waived. There was a sharp conflict in the evidence as to the extent of the damages sustained by appellee. If the jury believed the testimony of appellee and his witnesses they would have been justified in returning a larger verdict than they did. On the other hand if they believed the witnesses for appellant, the verdict is too large. As usual in such cases the jury did not accept the evidence on either side as absolutely true.

The amount of the damages was peculiarly a question of fact for the jury. They saw and heard the witnesses and it was their province to weigh the evidence. The fact that three witnesses on behalf of appellant placed the damages at a figure much less than the amount of the verdict, while only two witnesses for appellee testified that the damages were much more, is wholly insufficient to prove that the verdict is excessive.

Under the state of the record, we would not be warranted in holding that the verdict is manifestly against the weight of the evidence. So far as the abstract shows, no instructions were asked by either side and none were given to the jury. There were but few objections to the introduction of evidence and there is no argument presented to show that the court erred in any of its rulings with reference thereto. The judgment is affirmed.

Judgment Affirmed.

Not to be reported in full.

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

MARCH TERM, A. D. 1922

WILLIAM TOMZIK,
Plaintiff in Error.

vs.

HELEN DULICH, et al.,
Defendants in Error.Error to the
Circuit Court of
Franklin County,
Illinois.

Opinion by BOGGS, J.

On February 1st, 1917, one Jack Dulich, being the owner of certain premises in Frankfort Heights, Illinois, procured a loan of \$650 from plaintiff in error and executed a note and mortgage therefor on the premises in question. Prior to the execution of said mortgage, Dulich had contracted with one J. H. Mifflin to improve the property in question and certain indebtedness had become due the contractor, material men, and laborers in and about the making of said improvements for which said indebtedness the respective creditors filed mechanic's liens against the premises in question.

At the time of the execution of said mortgage, Mr. Dulich procured a policy of insurance on said premises with a mortgage clause in favor of plaintiff in error as his interest might appear. Shortly thereafter the premises in question were destroyed by fire. Dulich and his wife lost their lives as a result of the burning of said premises. A short time thereafter the respective lien-holders filed their bill in the Circuit Court of Franklin County to foreclose their liens making plaintiff in error and said insurance company parties defendant and praying that said company be enjoined from paying the amount of said insurance to plaintiff in error and further praying that the respective lien-holders be subrogated to the rights of the insured as to the insurance money due on said policy.

Thereafter at the September term A. D. 1918, of said court, plaintiff in error filed a bill to foreclose his mortgage against said premises, making appellee, Helen Dulich, the only heir of said deceased, party defendant thereto. To said bill the respective lien-holders asked and obtained leave to interplead. A cross bill was filed by the administrator of the estate of Jack Dulich, deceased, praying that the amount of said insurance be paid to him as administrator of said estate. Issues were joined on said pleadings and by agreement of parties said causes were consolidated and a hearing was had there-

on in open court. The court, after hearing the evidence, entered a decree ordering that the insurance money be turned over to the Master in Chancery and that he first pay to the lien-holders the amount of their respective liens and that after the payment thereof, the balance of said proceeds, if any, be applied upon the mortgage of plaintiff in error and also decreeing that the lot on which said house had been located be sold by the Master and that the proceeds of said sale be applied in the same manner as the insurance money. To reverse said decree, this writ of error is prosecuted.

The only question arising on this record is as to whether the lien claimants or the mortgagee are entitled to the insurance money. Plaintiff in error contends he is entitled thereto to the exclusion of the lien claimants, while they contend that by the doctrine of subrogation their right in equity to said funds is superior to that of the mortgagee.

The material facts are not in dispute. The validity of the several mechanic's liens and the amount due each respectively were stipulated on the trial by the parties in interest. It is also not disputed that said liens had attached under the lien law some time prior to the execution of said mortgage.

Plaintiff in error seeks to sustain his position on two grounds: First, that as mortgagee, he took out the insurance to protect his interest and personally paid the premium therefor; second, that under the law a mechanic's lien does not attach to the proceeds of an insurance policy taken out by the lot owner or the mortgagee. While plaintiff in error strenuously contends that he procured and paid for the insurance in question, the learned Chancellor found that said insurance was taken out by the owner, Dulich. In our judgment, the record supports that finding and also shows that while plaintiff in error advanced the premium on said insurance, he was afterward reimbursed therefor. This conclusion is borne out by the testimony of plaintiff in error himself. On his direct examination he testified: "Mr. Ferris wrote it (the policy) and I paid \$19.80 for it; I have been paid the premium." Plaintiff in error also testified that "he (Mr. Dulich) took out the policy in my name so far as the fire loss goes." On cross examination, plaintiff in error testified he paid the premium on said insurance and had never been reimbursed therefor, and did not expect to be.

The facts and circumstances disclosed by the record support plaintiff in error's statement made on direct examination that he had been repaid said premium. The mortgage itself provides that the mortgagor shall keep said premises insured with a loss clause to protect the mortgagee. Then, too, it may be observed that said policy not only covers said premises mortgaged but also includes \$300.00 on personal property owned by Dulich. It is not probable that plaintiff in error would have procured insurance on Dulich's household goods. The court did not err in finding that said policy of insurance was taken out by the mortgagor.

Plaintiff in error cites numerous cases to sustain his second contention; but whatever the rule may be in other jurisdictions, in Illinois, a mechanic's lien will attach to insurance money. One of the cases relied upon by plaintiff in error to sustain his position is *Elgin Lumber Company v. Langman*, 23



Ill. App. 250. An examination of this case discloses that the court recognizes the above principle. On page 252, the court says: "It is a familiar principle that equity in order to do justice, will frequently treat the money derived from property as it would the property itself, and will follow it as long as it can be identified. Appellants claim that this equitable principle is, under some circumstances, held to apply to insurance money; in which event the insurance money is held to represent the buildings destroyed and to be subject to the same liens, exceptions and rights."

"This contention must be at once conceded, as many cases of that sort are to be found in the books and one of the most recent of these is the case of the Grange Mill Co. v. Western Assurance Co., 118 Ill. 396. One answer made by appellee to this claim of appellants is that their lien for lumber and materials is merely statutory and is only upon the lot and house and appurtenances, and is in derogation of common law, and must be strictly construed, and not extended to embrace cases that are not within the language of the statute. We think this an insufficient answer. In the early case of Gaty v. Casey 15 Ill. 189, the materials furnished and attached to the freehold had become severed therefrom by fire, and sold by the purchasers under a deed of trust upon the premises, and it was held that a court of equity would treat the money derived from such sale as it would the property before a sale, and in behalf of the persons entitled to the mechanic's lien would pursue it into the hands of the party who had converted the property into money."

"This decision sufficiently indicates the rule to be that where the property to which the statutory lien attached has been converted into money, the court will, in a proper case, and for the benefit of the holders of the lien, treat the money as substituted for the property. It is a circumstance of no controlling importance, that in the one case the conversion is effected by selling the property and thereby putting it beyond the reach of the court, and that in the other case the same result is reached by means of an insurance and subsequent destruction by fire. If Utman himself had procured this insurance and paid the premium, and the insurance had been upon his interest in the premises, and the loss was payable to himself, then a very clear case for the application of the rule urged by appellants would be presented."

In Grange Mill Company v. Western Assurance Company, 118 Ill. 396, being also a case cited in Elgin Lumber Company v. Langman, supra, the court at page 399 says: "Undoubtedly, the law is, that, as between the vendee and the vendor, the insurance money, in case of the destruction of the property, represents the property itself, and in equity the insurance money should be appropriated to the vendor in case of the insolvency of the vendee. The principle is of frequent application, where a mortgagor or vendee, in case of loss, in equity, such party is entitled to the insurance money, to the extent at least of his interest in the property which was the subject of insurance."

In Stone v. Taylor, 63 Ill. App. 418, the court in discussing this question at page 421 says: "The cases, Gatz v. Casey, 15 Ill. 189; Ellet v. Tyler, 41 Ill. 449, and Elgin Lumber Co. v.

Langman, 23 Ill. App. 250, are authority that a mechanic's lien may attach to the proceeds of property to which the lien had attached, after the property itself is no longer accessible."

It may be further observed in this connection that Section 16 of the Mechanic's Lien law of Illinois clearly contemplates that in adjusting the rights of lien-holders or incumbrances on land or the proceeds thereof that the court shall take into consideration the prior or superior equities of the various lien-holders or incumbrancers.

Certain of the cases cited by plaintiff in error are cases where the mortgagee had himself taken out the insurance on his insurable interest in said property and had paid the premium thereon, and the court distinguishes this character of case from one where the owner of the premises takes out the insurance with a loss clause to the mortgagee as his interest may appear. *Elgin Lumber Co. v. Langman*, supra, makes this distinction. Plaintiff in error practically concedes as much in his argument wherein he says: "Had Dulich procured the insurance, or had his money paid the premium, or had the premium been included in the notes he gave to Tomzik, or had it been charged to him, it is possible that the defendants in error would have a better footing to stand upon."

As heretofore stated, the record supports the findings of the trial court that Dulich, the owner, procured the insurance. It might further be observed that under the law in this state, the mortgage clause in this case in favor of plaintiff in error does not amount to an assignment of the policy. It is the written policy itself that must determine who the assured is and whose interest was insured.

In the case of *Continental Insurance Company v. Hulman & Cox*, 92 Ill. 145, the court at page 154 says with reference to a policy containing a mortgage clause: "It has been repeatedly held by this court that such an indorsement does not operate as an assignment of the policy, nor as a contract to insure the interest of the mortgagees, but that they can claim only what the party originally insured is entitled to recover under his contract."

We hold, therefore, that the court did not err in decreeing that the liens of the respective lien-holders all of which attach to the premises in question prior to the execution and filing of the mortgage given to plaintiff in error, were prior to and superior to the rights of plaintiff in error in the funds derived from the payment of the loss on said policy, and that the court rightly decreed that said lien holders were entitled to be subrogated to the rights of Dulich in said policy to the extent of their respective liens.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Decree Affirmed.

Not to be reported in full.

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

MARCH TERM, A. D. 1922

THE PEOPLE OF THE STATE
OF ILLINOIS,

Defendant in Error.

vs.

HARLEY ROGERS,

Plaintiff in Error.

Error to the
County Court
Franklin County.

Opinion by BOGGS, J.

An indictment consisting of two counts was returned by the Grand Jury of Franklin County, charging plaintiff in error in apt terms with keeping a gambling house contrary to the statute in such case made and provided. A motion to quash said indictment was made by plaintiff in error and the same being overruled by the County Court of said County, a plea of not guilty was entered.

After a jury had been empaneled to try said cause, plaintiff in error, by leave of court filed a plea of mis-nomer alleging in effect that his name was "Arley" and not "Harley" Rogers as set forth in the indictment. Thereafter and prior to the hearing of the evidence by the jury the court on motion of the States Attorney struck said plea from the files. On a trial said jury returned a verdict finding defendant guilty. Motions for a new trial and in arrest of judgment made by plaintiff in error were overruled by the court. Judgment was rendered on said verdict and a fine of \$100 and costs was imposed. To reverse said judgment plaintiff in error prosecutes this writ.

It is first contended by plaintiff in error that the court erred in striking the plea of mis-nomer from the files. A plea of mis-nomer is a plea in abatement and under the law, a dilatory plea and must be filed in the first instance. In *People v. Beak*, 291 Ill. 449, the court at page 435 says, in discussing this question: "Counsel for plaintiff in error also argues that the case should be reversed because the information on which he was tried gave his name as 'KnutBeak' and not 'Kurt R. Beak,' as his name really is. This question was not raised in the lower court. It seems to have been raised for the first time by an assignment of errors in this court. A misnomer of the defendant in an indictment or information may, and must, be pleaded in abatement." (12 Cyc. 359). Such a plea must always precede the plea of not guilty, because a plea of not guilty waives all precedent irregularities. 8 R. C. L. 113; 16 Corpus Juris, 1260; *Davids v. People*, 192 Ill. 176."

The Court did not err in striking said plea from the files.

It is next contended by plaintiff in error that the Court erred in its rulings on the evidence. One of the grounds urged on this assignment is that the court permitted the States Attorney to ask leading questions over his objection. An examination of the record will disclose that the court committed no substantial error in its rulings on said questions.

It is also insisted that the court permitted the States Attorney to offer proof as to plaintiff in error's name, and that he was known as "Harley Rogers." The Court did not err in permitting the introduction of this evidence. In this connection it may be observed counsel for plaintiff in error went into this question on cross examination of one of the State's witnesses.

It is next contended that the court erred in refusing plaintiff in error's refused instruction. This instruction undertook to submit to the jury the question as to whether or not plaintiff in error is correctly named as "Harley Rogers" in the indictment. The plea of misnomer having been stricken from the files by the court there was no issue of that character before the jury. The court did not err in refusing said instruction.

It is also contended by plaintiff in error that the court erred in not submitting to the jury its instruction as to the form of their verdict on two separate pieces of paper. No authority in support of this contention was cited and we undertake to say none can be found. It might also be observed in order to raise this question, plaintiff in error should have presented instructions in that form to the court with a request that they be given, then if refused, he would be in a proper position before the court to urge his assignment of error. We hold, however, that the court properly instructed the jury as to the form of their verdict.

Lastly, it is contended by plaintiff in error that on the whole record, it fails to show his guilt by that degree of proof required in criminal cases. The record discloses that plaintiff in error was in charge of the building in question, and that it was equipped with tables for gambling, with dice and cards. The building was raided and at that time there were men playing with cards with money on the table. The evidence was clear and conclusive that this building was used as a gambling house—a place where persons were permitted to come together for the purpose of gambling, and there is no testimony in the record to the contrary. The jury were fully warranted in rendering the verdict they did and we cannot well see how, on the record, they could have found otherwise.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment Affirmed.

✓ Not to be reported in full.

MARCH TERM, 1922.

OMER CASH,

Defendant in Error,

vs.

JOHN BARTON PAYNE, as Di-
rector General of Railroads, and
as Agent of the UNITED
STATES of AMERICA, etc.,
Plaintiff in Error.

Error to
Williamson

OPINION BY HIGBEE, P. J.

This is an action in case brought by defendant in error, Omer Cash, against plaintiff in error to recover for personal injuries to himself and damage to his automobile which he claims to have sustained on the 27th of February, 1918, when a caboose of plaintiff in error struck his automobile on a public highway crossing near Spillerton, a small station some two miles north of Marion, Illinois, on the Chicago and Eastern Illinois Railroad. Plaintiff in error's track at this place runs north and south and on the east side of it there is a cinder platform about 200 feet long on which is located a depot or shelter station. At the north end of the cinder platform is a public highway crossing running east and west, where the accident happened. About 425 feet north of the west end of the cinder platform according to the plat introduced in evidence is located a switch stand at which point there is a switch track branching off from the main track on the west side thereof. About two miles north of Spillerton is Johnson City. Going south from Johnson City towards Spillerton the railroad is considerably up-grade to a point at or near this switch, but from this point onto the station the track is level or possibly a little down grade. On the day in question a train crew of plaintiff in error was coming south from Johnson City toward Spillerton with a locomotive, 2 freight cars and a caboose. This train was backing south, the locomotive being at the north end, the caboose at the south end and the two freight cars between the locomotive and caboose. Just before reaching the switch the caboose was disconnected from the freight cars and, as testified to by the crew, the steam was shut off from the engine and the speed of the engine and two freight cars slackened so that the caboose could proceed far enough ahead of the remainder of the train to pass on down the main line while the locomotive and the two freight cars were switched onto the side track, making what is termed in railroad parlance a flying switch.

It is quite clear from the evidence that no bell was rung nor whistle sounded nor any warning of any sort given as this caboose approached the highway or as the engine and cars approached the station. Defendant in error was engaged in the taxi business and had that morning left the city

of Marion with two passengers for the station at Spillerton. He approached this crossing from the east but instead of crossing the track turned down on the east side thereof for a short distance on the cinder platform so that his car was headed south. He testified that as he came from the east, and before turning south onto the cinder platform, he looked to the north and saw this train near the switch, as he thought standing still. His car was enclosed with what is termed, "a winter top" with windows constructed of what the witness called "isinglass". It was not raining but was cloudy and the road approaching this crossing was somewhat slippery. After discharging his two passengers he picked up another one and backed his car north to the highway and then turned, still backing, to the east on this highway so that his car was facing west toward the crossing. The passenger whom he picked up at the station testified that as he got into the car he saw and heard this train and that it sounded as any other train running, but that it seemed to him, it stopped. Defendant in error testified that after he had backed his car to the north and east and after he had faced westward toward the crossing he again looked to the north and saw this train, but thought it was standing still. He also looked to the south but did not again look to the north. He then drove onto the crossing where the caboose then struck his car. Both he and his passenger testified that they did not hear the caboose, and that it was making no noise. It is quite clear that no signal was given of the approach of the caboose or the remainder of the train. On a trial before a jury a verdict was returned in favor of defendant in error in the sum of \$600.00 for which judgment was rendered.

It is urgently insisted by attorneys for plaintiff in error that the verdict and judgment in this case are contrary to the manifest weight of the evidence for the reason, as it is claimed, that the evidence clearly shows defendant in error at and immediately prior to the time of the accident was not in the exercise of due care and caution for his own safety, but that on the contrary the evidence does show he was guilty of contributory negligence in not looking to the north after starting to the west and therefore not entitled to recover. It cannot be questioned but that the agents of plaintiff in error were negligent in shunting this caboose down toward and over the public crossing without giving a signal or warning of any kind and that such negligence was directly responsible for defendant in error's injuries and damage to his car, therefore, if the record is free of error, defendant in error was entitled to recover, unless the evidence shows he was guilty of contributory negligence. The failure of one approaching a railroad crossing upon a highway to look and listen for approaching trains is not negligence *per se* as a matter of law, but such failure is a fact to be taken into consideration with all the other evidence in the case in determining whether such person was guilty of negligence in the particular case and that question is one of fact for the jury to determine. (T. P. & W. Ry. Co. v. Hannett, 220 Ill. 9; Dukeman v. C. C. C. St. L. R. R. Co., 237 id. 104). The evidence in this case clearly

shows that defendant in error saw these cars as he drove up to the station and also after he had backed his car to the east and that in both instances he thought they were standing still. His passenger also testified that he heard the train at the time he got into the car, and that it sounded like any other train which was running, but it appeared to him that it stopped. The conductor who was on the caboose testified that the caboose was disconnected about 75 feet north of the switch and that when it passed the switch it was about 25 feet ahead of the remainder of the train, that when the caboose was disconnected the remainder of the train slackened its speed to such an extent that in traveling this distance of 75 feet the caboose, which the crew testified was traveling slowly, had gained a distance of 25 feet on the remainder of the train. Under such circumstances a person at a distance of 400 or more feet away might easily have thought the train was stopping or had stopped. Especially is this true when the train was approaching a public crossing without giving any of the signals required by the statute. Defendant in error had the right in approaching this crossing to assume that plaintiff in error would perform the duty imposed upon it by the statute to warn him of the approaching caboose by giving the required signals. *B. & O. S. W. Ry. Co. v. Then*, 159 Ill. 535; *C. B. & Q. R. R. Co. v. Gunderson*, 174 Ill. 495. It may well be said in this connection as was said by the Appellate Court of the Third District in a very similar case, "their motion was, in fact, slow for a moving train, and therefore was comparatively noiseless. There was no engine attached to it, no bell on it announcing its approach. Under the circumstances he might, not unreasonably, take it to be standing. Having so taken it, he dismissed all question of danger from it, and without further attention proceeded in the natural and direct course on his way". *C. A. & St. L. R. R. Co. v. Gomes*, 46 Ill. App. 255. The question whether defendant in error was guilty of contributory negligence in not looking to the north as he drove upon the crossing as claimed by plaintiff in error, was under the facts and circumstances of this case a question for the jury to determine and we cannot hold that the finding of the jury on this question is so against the manifest weight of the evidence as to require a reversal of this judgment.

On behalf of defendant in error the court gave an instruction to the effect that the words, "Stop, Look and Listen" do not mean that a person going upon or over a railroad crossing must come to a complete standstill unless coming to a complete standstill would be considered necessary by reasonable men under the same or similar situation, but that the person going upon or over the crossing in question must use the facilities at his command to observe and avoid danger, if any, of going upon or over said crossing at the time and place in question. It is insisted by plaintiff in error that the giving of this instruction was erroneous in that it made the question of whether plaintiff came to a complete standstill a material issue in the case, and that the jury must have believed by this instruction that it was not the duty of defendant in error to bring his automobile to a complete standstill

in order to be in the exercise of reasonable care for his own safety. It does not appear from the evidence that this "Stop-Look-Listen" sign was erected by the highway commissioners at the discretion of the State Utilities Board under the 1917 law and this instruction therefore properly stated the law that such signal does not necessarily require a full stop except under the circumstances set forth in the instruction. It was not error therefore to give it.

Complaint is also made of instructions 2, 3 and 5 given in behalf of defendant in error on the ground that these instructions limit the due care necessary to be exercised on the part of defendant in error to the precise time or exact moment of the collision, whereas, as it is contended it was incumbent upon him to exercise such care both at and immediately prior to the actual collision. It is true that these instructions contain the statement that the jury must believe the plaintiff was exercising reasonable care "at the time" of the injury. We do not believe that, considering instructions on the whole, the jury could have been misled by this statement. It was said by the Supreme Court in considering a similar instruction, in the case of *L. S. & M. S. Ry. Co. v. Johnsen*, 136 Ill. 641 that "the words 'at the time' as used in the instruction, refer to the whole transaction or series of circumstances, from the time plaintiff reached the tracks to the time when he was injured, leaving it to the jury to determine whether he used due care before he stepped upon the unoccupied track and while he stood there. If this were not so, the defect was cured by several of the defendants instructions which required the jury to find that plaintiff was exercising due care both before and at the time of the accident." The 10th instruction given in behalf of defendant in error in this case, informed the jury that "it is material and absolutely essential for the plaintiff, Cash, to prove by the greater weight or preponderance of all the evidence in the case that he, himself at the time, and immediately before the time, that his automobile was struck by the defendant's caboose, if it was so struck, was in the exercise of all reasonable care and caution for his own safety." It is also urged that instruction number 3 was erroneous because it advises the jury to assess such damages as they find and believe plaintiff is entitled to as compensation without limiting the jury to the damages as shown by the evidence or giving them any rule to estimate the damages and without finding that such damages resulted from the negligence charged in the declaration. An examination of the instruction in connection with the series of instructions in the case leads us to the conclusion that this criticism is not well founded.

Complaint is also made that improper remarks were made to the jury by one of the attorneys for defendant in error. These remarks are subject to criticism and similar ones have been condemned by the Supreme Court of this state. They were however when made objected to, the objection was sustained and the court promptly instructed the jury to disregard them. In view of this ruling of the court and the fact

that the verdict does not appear to be excessive we cannot hold that such remarks constitute reversible error, although much to be condemned.

The judgment of the court below will be affirmed.

Affirmed.

Not to be reported in full.

MARCH TERM, A. D. 1922.

THE PEOPLE of the STATE OF
ILLINOIS,Defendant in Error,
vs.

FITZHIGH OVERTURF,

Plaintiff in Error.

Error to
County Court
of Franklin.

226 I.A. 653

OPINION BY HIGBEE, P. J.

Plaintiff in error was found guilty in the county court of Franklin county, of neglecting to provide the necessary support and maintenance for his infant child and sentenced to pay a certain amount monthly, as a fine for the benefit of such child.

The information consisting of one count upon which he was tried, contained the following charge: "That Fitzhigh Overturf, on the 15th day of July, in the year of our Lord one thousand nine hundred and twenty-one, at and within said county of Franklin, in the State of Illinois, aforesaid, did then and there unlawfully, without lawful excuse, neglect to provide the necessary support and maintenance for his child, to-wit, Roberta Rhicawn Overturf, of the age of six weeks, contrary to the form of the statute in such case made and provided". Defendant in error claims that the trial court erred in overruling his motions for a new trial and in arrest of judgment and in entering judgment against him for the reason that the information was insufficient to support the verdict and judgment. The statute upon which the information was based provides, "that any person who shall without lawful excuse desert or neglect or refuse to provide for the support or maintenance of his or her child or children, under the age of eighteen years, in destitute or necessitous circumstances, shall be deemed guilty of a misdemeanor". It is a well recognized rule of law that an indictment or information must allege all the facts necessary to constitute the crime with which the defendant is charged, and if it does not set forth such facts with sufficient certainty, it will not support a conviction. (People vs. Picord, 284 Ill. 588. People vs. Stayan, 280 id. 300).

The information in this case was fatally defective in that it failed to state that the child of defendant in error was in "destitute or necessitous circumstances" at the time in question.

We do not ignore the fact that defendant in error has filed no briefs in this cause, so that the judgment could well

have been reversed pro forma under rule 27 of this court, but we have deemed it best to consider the case upon its merits. By reason of the failure of the information to contain necessary allegations to sustain the conviction of defendant of the crime contemplated by the statute with which he was sought to be charged, the judgment will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

Term No. 12

Agenda No. 10

MARCH TERM, A. D. 1922.

CLYDE DIEHL,

Appellant,

vs.

GUSTAVE DUECKER,

Appellee.

} Appeal from St. Clair.

226 I. A. 653

OPINION BY HIGBEE, P. J.

This is an action on the case brought by appellant to recover damages from appellee for personal injuries claimed to have been sustained by him on the 15th day of May A. D. 1920 in an automobile collision, at the intersection of Caseyville Avenue and Bracket Street in the Village of Swansea, Illinois. The declaration consisted of two counts, one being a count under the motor vehicles Statute alleging excessive speed on the part of appellee in driving his car at the place in question and the other charging that appellee carelessly, negligently and improperly drove his automobile; that by reason of said acts of alleged negligence, the automobile of appellee ran into and struck appellant's automobile with great force and violence and appellant thereby sustained the injuries for which he brings suit. At the close of the evidence offered by appellee the court on motion of appellant instructed the jury to find appellee not guilty and such a verdict was accordingly entered. From the judgment entered on that verdict against appellant he has appealed to this court, alleging that the court erred in directing the verdict and entering judgment against him. Caseyville Avenue runs north and south and Bracket street east and west in said village. Appellant was at the time of the collision engaged in driving a truck delivering groceries and meats for his father and was traveling west on Bracket Street. Appellee was coming south on Caseyville avenue in a touring car and ran into the truck driven by appellant at the intersection of these streets. Appellant testified that he approached this intersection at a slow rate of speed and with his machine in second gear, and that before crossing the intersection he looked both north and south and saw no automobile approaching. It appears that the truck was slightly west of the center of the intersection when struck by the car. Appellant and other witnesses testified that he sounded his horn before reaching the intersection. One witness testified that he saw appellee coming south on Caseyville Avenue about 200 or 300 feet north of the crossing, and that he was traveling "pretty fast" probably about forty miles an hour. Another witness stated that appellee told him he saw there was going to be an accident, and shut his eyes and let loose of the steering gear.

It appears from the proof that appellee was guilty of negligence in approaching the street intersection at an ex-

cessive rate of speed but it is claimed by him that the court directed the verdict for him on the ground that appellant was guilty of contributory negligence. Section 33 of the Motor Vehicles Act provides: "All vehicles traveling upon public highways shall give the right of way to other vehicles approaching along intersecting highways from the right and shall have the right of way over those approaching from the left."

Appellee contends that under this statute he had the right of way at the crossing for the reason that he was approaching the crossing to the right of appellant, and that appellant was guilty of contributory negligence because he did not look to the right and left while he was on the street intersection. It appears from the proof however that before crossing the intersection appellant looked north and south and saw no machine coming from either direction. Whether or not appellant was guilty of contributory negligence was a question of fact to be determined by the jury, and we believe in view of all the circumstances shown by the proofs, including the evidence that appellee was driving at an excessive rate of speed a short distance from the street intersection, this question should have been submitted to the jury.

The judgment is therefore reversed and the cause remanded.

Not to be reported in full.

Term No. 15

Agenda No. 19

MARCH TERM, A. D. 1922.

GEORGE E. GLEASON,

Appellant,

vs.

J. E. BLACK CHARCOAL COM-
PANY,

Appellee.

2267 1 553
Appeal from Pulaski.

OPINION BY HIGBEE, P. J.

Appellee, J. E. Black, was engaged in the charcoal business at Ullin, Illinois, under the name of J. E. Black Charcoal Company. Appellant, George E. Gleason, was engaged in the buying and selling of wood, and appellee had an arrangement whereby he agreed to buy wood of him delivered at appellee's yards for \$1.00 more per cord than the same cost appellant. Mrs. J. T. Adkins was the owner of certain wood which her minor son, Robert Adkins, was cutting and hauling to appellee's plant. Appellant claims that on December 11, 1920, he purchased this wood from Robert Adkins, and paid him for 20 cords at the rate of \$4.00 per cord; also that he had a conversation with appellee in which appellee stated he had deducted one cord of bad wood which he couldn't use. Appellant demanded pay of appellee for 19 cords of wood at \$5.00 per cord which was refused and this suit was brought. Mrs. Adkins testified that her son was hauling this wood for her, and that he had about a one-fourth interest as pay for his work; that he paid off the hands and gave her \$40.00 of the money which was satisfactory to her.

On the other hand appellee claims that he bought the wood from Mrs. Adkins prior to December 8, 1920, and in support of that contention introduced the following letter in evidence.

"Ullin, Ill., Dec. 8, 1920.

Mr. Black

Dear Sir:

For fear you will forget what I told you about the wood, I am writing you. You be sure and not pay Robert any on the wood at any time, as I will pay him for his work. The timber is mine, and he will not do as I tell him, so I have this to do. Please do not say anything to anybody else, just deposit what the wood comes to in the bank in J. T. Adkins name. Be sure and not let him talk you out of any of it.

Respt.

Mrs. J. T. Adkins."

It appears from the proof that after the delivery to him of the wood, appellee deposited \$76.00 in the First National Bank of Ullin to the credit of Mrs. J. T. Adkins. This he says he did some four or five days before appellant demanded pay for the wood from him. It also appears that Mrs. Adkins

received notice from the Bank that the money had been placed to her credit and notified the bank through her son to transfer it from her account and deposit it to the account of appellee. For some reason the money was not transferred to the credit of appellee, but to that of a Mrs. Heminway who, the evidence tends to show, was at one time interested in business with appellee. The case was tried before the court without a jury and the issues were found in favor of the defendant. It is conclusively shown that the wood belonged to Mrs. Adkins. The fact that her son may have received a portion of the proceeds as pay for his work in handling the wood in no way made him a part owner thereof. It would appear from the above letter of December 8th that there had been prior to that date some understanding between appellee and Mrs. Adkins as to the sale of the wood and appellee in every respect complied with all the directions contained in the letter.

It being her wood at the time of the sale of the same by her to appellee she could not afterwards rescind the sale by refusing to accept the deposit made according to her directions.

Both appellee and appellant paid for this wood, one paying the owner, Mrs. Adkins and the other paying her son and all the trouble between the parties was caused by the failure of the bank to obey the instructions of Mrs. Adkins and transfer the payment made by appellee back to him instead of crediting the same to Mrs. Heminway. No propositions of law were submitted to the court upon the trial, and we are only called upon to determine the questions of fact. Upon a consideration of all the evidence we conclude that the findings of the trial court were right and that the judgment should be affirmed.

Affirmed.

Not to be reported in full.

MARCH TERM, A. D. 1922.

F. L. STEVENS,

Appellant,

vs.

O. W. REED,

Appellee.

} Appeal from
Lawrence.

2207 1.653

OPINION BY HIGBEE, P. J.

This is an action in assumpsit brought by F. L. Stevens, appellant, to recover from O. W. Reed, appellee the amount due on three instruments, referred to as trade acceptances, which appellee signed and executed on December 10, 1920, each for the sum of \$43.45 due respectively in 3, 5 and 7 months after date. On said date a salesman of the Donald-Richard Company of Iowa City, Iowa, secured from appellee an order for certain merchandise. The instruments sued upon and one other due 9 months after date were executed by appellee in payment for the merchandise so ordered. Appellant testified that on January 11, 1921, he purchased the first three of said instruments from said company at a discount of ten per cent. The order for the goods provided that all claim under the warranty provided for therein would be waived unless a detailed statement of such claim should be sent by registered mail to the Donald-Richards Company within ten days from receipt of goods. Appellee admits that he signed the order and the instruments sued upon in question, and that he received the goods shortly before Christmas, 1920. He further admits that he in no way notified the company the goods were not satisfactory, but states that he placed them on sale and after selling a small portion of them shipped the remainder back to the company in February, 1921. He however contends that his signature to the instruments sued on was obtained by fraud and circumvention on the part of the salesman. The fraud claimed by him is that the salesman told him the instruments sued on were a part of the order for the merchandise, and that he did not know he was signing and did not intend to sign any trade acceptances; that he did not know he was giving the same in payment for the goods ordered or that they were due in 3, 5 and 7 months. He testified that he knew how to read and write, had been in business for six years and that he read the order over but did not read any of the trade acceptances. In our opinion no sufficient excuse is shown by appellee for not reading the instruments and the evidence fails to establish the charge that fraud and circumvention, as those terms are used in the "Ne-

gotiable Instruments Act", were used in obtaining his signature to them.

The trial court refused to give the following instruction offered by appellant: "The court instructs the jury that the defendant has alleged in this case that the plaintiff purchased the said instrument sued upon with a knowledge of the transactions claimed to have been had by the defendant and Donald-Richard Company. This the defendant would have to prove by a preponderance of the evidence and unless he has so done your verdict on that question should be for the plaintiff."

The burden was upon appellee to establish by a preponderance of the evidence any fraud or circumvention relied upon by him to defeat his liability on these instruments. This instruction correctly stated the law in that respect, and it was error to refuse it. The judgment is reversed and the cause remanded.

Reversed and remanded.

✓ Not to be reported in full.

MARCH TERM, A. D. 1922.

M. C. HOLTSLOW,

Appellee,

vs.

THE BALTIMORE & OHIO
SOUTHWESTERN RAILROAD
COMPANY,

Appellant.

Appeal from Marion.

2261A 553

OPINION BY HIGBEE, P. J.

This is a suit by M. C. Holtslaw, appellee against The Baltimore & Ohio Southwestern Railroad Company, appellant, to recover damages for the loss of a jack belonging to appellee and killed by a passenger train of appellant on or near a public highway crossing near Iuka, Illinois. It was tried at the September Term, 1921 of the Circuit Court of Marion county, where there was a verdict and judgment in favor of appellee for the sum of \$250.00.

The evidence shows that the animal killed and two others were kept by appellee in a pasture about three-quarters of a mile south of the crossing in question, where there was an opening leading onto the public highway through which on the day of the accident they wandered into the highway. The accident was witnessed by three persons who were almost a quarter of a mile from the crossing, but whose view of the crossing was unobstructed. It would appear from their testimony that as the passenger train came from the west these animals were on or near the crossing at the public highway. As the train approached they ran onto the track and crossed the cattle guard on the east side of the highway. One of them turned and came back going north on the public highway, one disappeared from the view of the witness but the third was struck by the train at or a short distance east of the cattle guard and was killed. These witnesses testified that they neither heard the bell ring nor the whistle sound as the train approached the crossing. The fireman of the train which struck the animal testified he did not see the animals until his attention was called to them by the engineer; that he then saw two animals on the north side of and close to the track, and then looked out on the south side and saw one lying there and that the engineer told him they had hit it. He testified that the bell was rung continuously by an automatic ringer, and that the whistle was blown near to the crossing. The engineer also testified that the bell was ringing continuously as they approached the crossing and that he sounded a number of whistles, when he saw the ani-

mals and as he neared the crossing. He further testified that when he first saw the animals they were in the highway south of the track; that they came onto the track and the one killed was struck on the highway crossing and not east of the cattle guard; that he made an effort to stop his train which was running probably 55 miles an hour, but that he could not avoid hitting the same. Appellee introduced evidence as to the condition and make of the cattle guard. This evidence showed that the cattle guard was made of wooden strips $2\frac{1}{2}$ by 4 inches in size, seven feet long, beveled to an edge on the top side and placed 4 inches apart; that formerly there had been a pit underneath these guards but that it had been filled in with chat up to the bottom of the strips forming the guard.

Appellant introduced several witnesses to prove the condition of the cattle guards. One of them, a track inspector for appellant testified that he had had 23 years experience on railroad tracks and was acquainted with the standard construction of cattle guards in use for railroad purposes generally and that he was acquainted with this crossing and had known it about seven years. He was asked if this kind of cattle guard was in use by railroads generally. On objection by appellee he was not permitted to answer this question. Another witness who had been track foreman for appellant for twenty years also testified that he had known this crossing for twenty years and described its condition and construction, but testified that he did not know the form of cattle guards adopted and in use by railroads generally; that his experience had all been on the road of appellant. On objection of appellee this witness was not allowed to testify as to whether the cattle guard in question was constructed in the usual way for constructing such guards. Two other witnesses, section hands of appellant, testified that the cattle guard in question was in good condition and described its construction. The two witnesses however were not asked as to whether this cattle guard was of the same construction as used by railroads generally.

Appellant contends that the evidence shows the animal was killed upon the highway crossing and did not get upon appellants track until the engine was within a few feet of it, so that nothing could be done by the persons in charge of the train to prevent striking it, that it is therefore immaterial whether the evidence shows the signals were or were not given as under the circumstances the failure to give them could not have been the proximate cause of the injury; that if, on the other hand, the animal was struck and killed upon appellants right of way there would be no liability unless appellant had failed to comply with its statutory duty in the erection of sufficient cattle guards. Appellant's contention that if the animal was struck upon the highway crossing there would be no liability upon appellant is not without merit. But upon consideration of all the proof we think the jury amply justified in finding from the evidence of the eye-witnesses that the animal in question was struck east of the

cattle guard, and their verdict as a whole was based upon the proven facts. The laws of this state relating to the fencing and operating of railroads provides that railroad companies shall maintain cattle guards suitable and sufficient to prevent stock from getting on the railroad. Appellant insists that the trial court erred in not permitting its witnesses to testify upon his question, whether this cattle guard was of the standard in use generally by railroads. If there was error committed by the court it was in respect to the evidence of appellant's track inspector. He was the only witness of whom this question was asked who testified that he was acquainted with the character of cattle guards in use by railroads generally and was therefore qualified to answer. The other witness of whom this question was asked expressly testified that he did not know the character of cattle guards in use by other roads. Practically this identical question has been before the Appellate Court of the Third District. In the case of L. E. & W. R. R. Co. vs. Murray, 69 Ill. App. 274, that court held that evidence to the effect that the cattle guard in question was in general use by railroads as the best known, was proper for consideration as tending to show it was sufficient and suitable for the purpose, but did not constitute a complete defense within itself. The question before the court in that case was whether or not a certain cattle guard was a suitable and sufficient cattle guard. This same question was again before that court in the case of Steward vs. Bloomington, Chapin & Decatur Ry. Co., 180 Ill. App. 608, where it was held that testimony of experienced railroad men that a particular cattle guard was of standard make and in general use on first class railways was proper as tending to support the contention that the cattle guard in question was suitable and sufficient to turn stock.

We are of opinion that in this case the proffered testimony of appellants track inspector above referred to, should have been admitted, as hearing upon the question whether this was a suitable and sufficient cattle guard. But this testimony if favorable to appellant would not be conclusive of the sufficiency or suitability of this cattle guard for the purposes for which it was used and in view of the clear proof that the three animals belonging to appellee passed over it, one of them coming back over it again, with apparent ease, and that other animals at other times has crossed it, showing plainly that it was ineffectual to answer the purpose for which it was intended, we are of opinion that the refusal to admit this testimony did not constitute reversible error.

The judgment in this case is therefore affirmed.

Affirmed.

Not to be reported in full.

MARCH TERM, A. D. 1922.

ROSE C. WEHRLE,
Plaintiff in Error,

vs.

JESSE R. WEHRLE,
Defendant in Error.

} Error to Fayette.

226 I A. 654

OPINION BY HIGBEE, P. J.

Plaintiff in error, Rose C. Wehrle, was divorced from defendant in error, Jesse R. Wehrle, by a decree in her favor of the circuit court of Fayette county, October 18, 1918. By the decree of divorce, defendant in error was ordered to pay certain sums of money to plaintiff in error and in addition thereto was decreed to pay her as permanent alimony for the support of herself and her minor child, Gertrude Wehrle, the sum of \$10 on the first day of each month thereafter, beginning with December 1, 1918. At the August term of 1920 of said court, defendant in error filed a petition asking for a modification of that portion of the decree of divorce providing for alimony as aforesaid, alleging that since the decree was entered the complainant had been guilty of adultery and had become a lewd woman and common prostitute.


The prayer of the petition was that the decree be so modified as to permit plaintiff in error to have the custody and control of the minor children of said parties and that the petitioner be relieved from paying the plaintiff in error any alimony as provided for by the decree. Afterwards at the May term, 1921 of said court, plaintiff in error, by the name of Rose K. Hatfield, caused it to appear to the court that the defendant in error was in default in the payment of alimony and he was thereupon cited to appear at the August term of said court to show cause why he should not be held in contempt. At said term an order was made against defendant in error to pay the sum of \$70, being the amount of the unpaid alimony up to the time he filed his petition to modify said decree of divorce. Defendant in error paid the amount of delinquent alimony above mentioned and thereupon a hearing was had upon his petition to modify the decree of divorce which resulted in an order or decree setting aside and vacating that portion of the decree of divorce requiring defendant in error to pay \$10 alimony upon the first day of each month and relieving him from paying any further sum as alimony until the further order of the court. He was also discharged and released from the rule to show cause why he should not be held in contempt of court.

The evidence introduced on the hearing showed plainly that the plaintiff in error had been guilty of the misconduct charged against her and also that she had been remarried some months before the hearing. It also appeared that at the time of the hearing, the daughter, Gertrude Wehrle, for whose support, in part, the payment of alimony above referred to was ordered to be made, was living with her father, the defendant in error. The only complaint of the decree made by plaintiff in error appears to be that portion of it which relieved defendant in error from the payment of the alimony provided for by the original decree, between the time his petition to modify the decree was filed and the date at which the order appealed from in this case was entered, that is between the dates August 5, 1920 and October 3, 1921. It is contended by counsel for plaintiff in error that the claim for unpaid alimony up to the time of the decree of modification, was a fixed, ascertained and subsisting debt due from defendant in error to plaintiff in error and that the court had no right to relieve defendant in error of its payment. Section 18 of our Divorce Statute, provides, that the "court may on application from time to time, make such alterations in the allowance of alimony and maintenance and the care, custody and support of the children as shall appear reasonable and proper," and our courts have as a universal rule maintained the right to hear applications for modifications or alterations of decrees, providing for the payment of alimony in divorce cases. *Stillman vs. Stillman*, 99 Ill. 196; *Cole vs. Cole*, 142 id. 19; *Craig vs. Craig*, 163 id. 176. It is claimed by counsel for defendant in error that the case of *Craig vs. Craig*, supra, sustains the claim that the court had no power to relieve a delinquent party from the payment of alimony between the time of the filing of the petition and the entry of the modifying order, because it is said by the court in the opinion in said cause, that, "there is, however, one claim of error that is well made, this claim is that it was error to refuse to enforce the payment of alimony already due by virtue of the decree and to enter an order which canceled said alimony;" and further held that permanent alimony by a divorce decree, becomes a debt from one party to the other. In that case, however, it appears that the court canceled all payments of alimony, seven installments which were due and unpaid at the time the petition for the enforcement of such payments was filed, and entered a new order for the payment of a certain number of similar installments to commence in the future, so that the question under consideration here was in no wise determined there.

In the case of *Cole vs. Cole*, supra, it was said of the divorced husband who was in arrears in the payment of alimony, that he would not be permitted to ask relief from a decree of which he was in contempt; that before he should be permitted to be heard he should be required to comply with the order of the court *up to the time of his application to vacate the decree for alimony*. In the instant case plaintiff in error had fully complied with the order of the court that

he pay all arrears of alimony up to the time his petition for the modification of the decree was filed and we are of opinion that the court had full power to enter an order directing that further payments cease at the date of the filing of the petition and that the circumstances of the case as shown by the proof justified the entry of the decree containing an order to that effect.

Decree affirmed.

 Not to be reported in full.

MARCH TERM, A. D. 1923.

261 A. 654

A. G. ERLINGER,

Appellee,

vs.

CARL WIEGMAN,

Appellant.

Appeal from
City Court
of East
St. Louis.

OPINION BY HIGBEE, P. J.

On June 23, 1920, appellee was struck by an automobile on the streets of East St. Louis. This suit was brought against C. J. Wiegman, the driver of the car, and appellant, Carl Wiegman, its owner, to recover damages for the injuries received in such accident. On trial a verdict was returned finding "the defendant" guilty and assessing plaintiff's damages at \$250.00. A motion for a new trial was overruled. Appellee dismissed the suit as to C. J. Wiegman and judgment was rendered against Carl Wiegman, who perfected this appeal.

C. J. Wiegman is the son of appellant, Carl Wiegman, and at the time of the accident was 17 years of age. It appears from the evidence that the son drove the car whenever he desired, when it was not in use by the father. He had used it that morning to go to his place of employment, and at the time of the accident, was alone in the car, returning home from such place of employment. By apt motions, appellant at the close of appellee's evidence, and again at the close of all the evidence, asked the court to instruct the jury to find a verdict in his favor which motions were denied.

We understand the important and controlling question on this record to be, assuming that the evidence shows the son was negligent, at the time appellee was injured, in driving the car, is appellant, the father, liable for that negligence? It clearly appears from the evidence that at the time of the accident, the son was using the car for his own personal purpose. In a very similar case (*Arken v. Page*, 287 Ill. 420) the Supreme Court by a majority opinion, held that the owner of an automobile is not liable for an injury caused through the negligent driving of the automobile by his son while using it for some personal purpose of his own, but that the liability of the father, if any, must rest upon the agency of the son. The Appellate Court of the First District has held to the same effect in *Minasion v. Poff*, 217 Ill. App. 8. While we are aware that the holdings of some courts are not in harmony with this theory yet, the different decisions on this question are so elaborately discussed in the majority and dissenting opinions in the *Arken* case, that we deem it unnecessary to refer to other cases further than to say that the true doctrine,

as it seems to us was well stated by the Supreme Court of Kansas in the case of *Watkins v. Clark*, 103 Kans. 629, where it was sought to hold a father for damages occasioned by his daughter, while driving his car, as follows:

"The purchase of the automobile by the defendant for the use of his family, including his daughter, operated as a gift to them of the right to use it. When using it to accomplish his purpose, whether business or pleasure, they represent him, but when they exercise their privilege, and use it to accomplish their own distinct purposes, whether business or pleasure, they act for themselves and are alone responsible for their negligent conduct". In conformity with the decisions above referred to we must hold that in the absence of proof tending to show that C. J. Wiegman was the agent of his father the appellant, in driving the car at the time of the accident, the verdict in favor of appellee cannot be sustained.

The trial court refused to give the following instruction offered by appellant: "The court instructs the jury that it does not appear that the defendant, Carl Wiegman was personally in charge of the automobile at the time in question in this suit, and therefore, before the defendant Wiegman can be found guilty in this case it is necessary for the plaintiff to prove, among other things, by a preponderance of the evidence, that the person in charge of the automobile in question, at the time in question, was, at such time, the agent, servant or representative of the said Carl Wiegman, and unless this has been proved by a preponderance of the evidence you should find the defendant, Carl Wiegman, not guilty." In our view of the law this instruction set up a good defense for appellant in this case, and it was error to refuse it.

The following instruction was given in behalf of appellee: "The court instructs you that in an action brought to recover damages, either to the person or property, caused by running an automobile propelled by mechanical power in the public highway in the built-up portion of a city at a greater rate of speed than fifteen miles per hour, the plaintiff is deemed to have made out a prima facie case by showing the fact that he has been injured and that the person running such automobile, either by himself or his agent, was at the time of the injury running the same at a speed in excess of fifteen miles per hour." The facts set out in this instruction do not make out a prima facie case for plaintiff, but only constitute prima facie proof that the car was being driven at an unlawful rate of speed. In addition to such facts the plaintiff must at least prove he was exercising due care and caution for his own safety, before he has made out a prima facie case. It was error to give this instruction.

For the errors herein pointed out the judgment is reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

Term No. 50.

Agenda No. 7.

MARCH TERM, A. D. 1922.

THE BULGARIAN MACEDONIAN HOLY TRINITY CHURCH and CHRISTO I. KARABOSHEFF, for the use of E. C. ROBINSON LUMBER COMPANY,

vs.

INSURANCE COMPANY OF NORTH AMERICA Garnishee, and the TRUSTEES OF THE BULGARIAN HOLY TRINITY CHURCH, Claimants,

Appellee,

Appellants.)

Appeal from County Court of Madison.

226 I.A. 854

OPINION BY HIGBEE, P. J.

This was a garnishment proceeding instituted in the county court of Madison county by E. C. Robinson Lumber Company. The affidavit of garnishment upon which the proceeding was based alleged that on the 15th day of February, A. D. 1912, a judgment was rendered by the county court of Madison county in favor of E. C. Robinson Lumber Company, a corporation, and against "Holy Trinity Church, Reverent Christo I. Karabosheff, et al.," for the sum of \$574.80 debt and \$5.10 costs; that an execution had been issued thereon and returned "no property found"; that affiant had reason to believe that Paul Connole, agent for defendants, was indebted to said defendants and had effects and estate of said defendants in his possession, custody and charge. This affidavit was made January 22, 1920, and summons in garnishment against Paul Connole was issued thereon under date of February 19, 1920, and was returned by the sheriff as served on the 23rd day of February, 1920. On March 18, 1920, another affidavit was filed, relying on the same facts, alleging in addition that the Insurance Company of North America was indebted to said defendant and had effects and estate of said defendant in its possession. A summons was also issued upon this affidavit and served upon Paul Connole as agent of the Insurance Company of North America. By interrogatories in the usual form the garnishee was asked if it had in its possession, custody or control as agent or otherwise, any moneys, credits or effects, etc., of said defendants, "The Bulgarian Macedonian Holy Trinity Church and Christo I. Karabosheff." By its answers to these interrogatories the garnishee denied that it had in its

possession effects of, or was indebted to, these parties. Appellee, the E. C. Robinson Lumber Company, by proper pleading denied the truth of these answers. The appellants, Kosta Boboff, Eli Boshoff, Steve Mencheff, Sancho Toncoff and Pete Banlinkoff, filed their interplea alleging that the moneys, etc., attempted to be garnisheed in this action belonged to them as trustees of the Bulgarian Holy Trinity Church. The trial was had before a jury and the following verdict returned: "We, the jury, find that the garnishee, the Insurance Company of North America, is indebted to Christo I. Karabosheff and the Bulgarian Macedonian Holy Trinity Church in the sum of five hundred seventy-four dollars and eighty cents (\$574.80), with 5 per cent interest from the time judgment was rendered, for the use of the E. C. Robinson Lumber Company."

A motion for a new trial by appellants and the garnishee was overruled. The garnishee also filed a motion in arrest of the judgment, which was overruled and judgment was entered in favor of Christo I. Karabosheff and the Bulgarian Macedonian Holy Trinity Church against the Insurance Company of North America for the use of the E. C. Robinson Lumber Company in the sum of \$574.80. From this judgment the garnishee did not appeal, but an appeal was perfected by appellants, as trustees of the Bulgarian Holy Trinity Church. On the trial there was introduced in evidence the record of a judgment rendered in the county court of Madison county on February 15, 1912, against Christo I. Karabosheff and the Bulgarian Macedonian Holy Trinity Church in favor of E. C. Robinson Lumber Company for the sum of \$574.80. The execution record of that court was introduced in evidence and showed that an execution was returned "no property found," but no execution issued upon this judgment was introduced in evidence. It appeared that this judgment was for materials for the construction of a church in 1907 at Madison Avenue, in Granite City, Illinois. It also was proved that this church was known as the Bulgarian Macedonian Holy Trinity Church, and that Christo I. Karabosheff had charge of the construction of this church and was the priest in charge thereof, for a time at least, after its erection. The evidence on the part of appellants showed that another church was built in 1910 at Thirteenth and Green Streets in said city, which was known as the Bulgarian Holy Trinity Church, and that none of the materials for which the above judgment was obtained was used in the construction of this latter church. Some evidence on behalf of appellee would tend to show that a portion at least of these two congregations were the same people, but the evidence on the part of appellants is to the effect that the congregation of the newer church was composed entirely of Bulgarians and was a separate and distinct organization, although the same Christo I. Karabosheff was the priest of the latter church. The evidence further shows that on April 22, 1919, an insurance policy was issued to the trustees of the Bulgarian Holy Trinity Church covering the newer building, and that during the life of the policy the building was dam-

aged or destroyed. At any rate there was what is termed a loss on this policy and the amount of damages had been determined by the insurance company and the trustees to be \$1,500.00. This policy ran to "Trustees of the Bulgarian Holy Trinity Church." The \$1,500.00 agreed upon as due under this policy was the money sought to be garnisheed in this action. Nowhere in the policy does the name of Christo I. Karabosheff appear. It therefore is conclusive that no part of the money due on this policy was payable to said Christo I. Karabosheff, who was one of the judgment debtors mentioned in the judgment introduced in evidence, which is the basis of this proceeding. Neither is it clearly shown that the Bulgarian Macedonian Holy Trinity Church, the other judgment debtor named in the judgment introduced in evidence, is the same party or organization as the Bulgarian Holy Trinity Church mentioned in the insurance policy. In fact, the evidence tends to show that they are separate and distinct churches and denominations. Even though it be granted that the two churches are the same, yet money due the Bulgarian Holy Trinity Church could not be garnisheed under a judgment against that church and Christo I. Karabosheff jointly.

Under the original judgment introduced in evidence, appellee was a judgment creditor of two joint judgment debtors, namely, Christo I. Karabosheff and the Bulgarian Macedonian Holy Trinity Church. In *C. & N. W. Ry. Co. vs. Scott*, 174 Ill., 413, the Supreme Court expressly held that a judgment creditor of two joint judgment debtors can not maintain garnishment for a debt due to one of such debtors. In *Commercian Bank vs. Kirkwood*, 184 Ill., 139, the Supreme Court held that creditors of a firm composed of several persons can not by garnishment reach a debt due only one of the partners or owing to one only of the joint judgment debtors. To the same effect is *Siegel Cooper & Co. vs. Schueck*, 167 Ill., 522. Under these authorities, even though it be admitted that the Bulgarian Holy Trinity Church, mentioned in the insurance policy is the same organization as the Bulgarian Macedonian Holy Trinity Church, one of the debtors in the judgment introduced in evidence, yet since this judgment was against the church and Christo I. Karabosheff jointly, it can not be made the basis for garnishment proceedings against a debt due to the church alone.

It seems to stand admitted that the amount due under the insurance policy from the garnishee in this case is \$1,500.00, yet no judgment has been rendered for the surplus between that amount and the amount found to be due appellee. One of the reasons given by the Supreme Court in *Siegel, Cooper & Co. vs. Schueck*, *supra*, why a debt due to one of two joint judgment debtors can not be garnisheed is that since the debt is due to only one of the debtors, there can be no judgment entered in the garnishment proceedings for the surplus, if any, due such judgment debtor. So, in the instant case, since no part of the money due from the insurance company was payable to Karabosheff, one of the judgment debtors, there can be no judgment over for the differ-

ence between the amount of the judgment and the amount due on the insurance policy.

There appears to us to be another fatal objection to the judgment under consideration. The original judgment was rendered on the 15th day of February, 1912, and was therefore more than seven years old at the time this action was instituted. No execution could have been issued thereon. Our courts have repeatedly held that a garnishment proceeding is but another manner of attempting to collect a judgment after the common law method of collecting by an execution has failed. In *Pierce vs. Wade*, 19 Ill. App. 185, the Appellate Court for the Third District in a case in which garnishee process was issued September 21, 1883, upon a judgment rendered by a justice of the peace February 19, 1873, and the only execution ever issued on said judgment was returned, no property found, April 8, 1873, held that by reason of the lapse of time no execution could have issued upon the judgment, and its validity was thereby so impaired that it could not be made the foundation for proceedings in garnishment. In that case the court in an opinion by Justice Wall said: "If the judgment could not have been enforced in its then condition against the defendant therein by execution, it should not be used for the purpose of taking from him a demand against the garnishee, by a proceeding to which he is not a party and of which he has no notice." The Appellate Court for the First District in a case where the judgment upon which garnishment had issued was set aside and vacated after the issuance of the garnishment writ held: "The garnishment proceeding was in the nature of process to obtain satisfaction of the original judgment. It was a statutory mode of obtaining satisfaction after the means known to the common law had been employed and failed. When the judgment of which satisfaction was sought, ceased to exist, the supplementary processes to enforce its satisfaction had spent their force." *Pick vs. Mutual Life Ins. Co.*, 94 Ill. App., 483. The Appellate Court of the First District in another case in which the record failed to show the judgment upon which the garnishment proceeding was based, held: "The record is absolutely bare of any evidence of the alleged judgment upon which the garnishment purports to be founded. This is fatal. There must be a judgment upon which execution can issue against the judgment debtor." *Siegel, Cooper & Co. vs. Schueck*, 60 Ill. App., 429. Since it is a recognized doctrine that garnishment is a supplementary process provided by the statute for obtaining satisfaction of a judgment after the common law execution has been employed and failed, it would seem to follow that garnishment can not be based upon a judgment upon which no execution can be issued.

For the reasons above expressed the judgment must be reversed, and as under the rules of law referred to, the garnishment proceeding can not be maintained, the cause will not be remanded.

Reversed.

Not to be reported in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

MARCH TERM A. D. 1922

HELEN JANKOWSKI,

Defendant in Error,

vs.

JIM LAZAROFF,

Plaintiff in Error.

2267 654
Appeal from
Madison Circuit
Court.

OPINION BY BARRY, J.

This is a breach of promise suit wherein defendant in error recovered a verdict and judgment for \$1,000.00. There is no doubt under the evidence, but that plaintiff in error, a man 35 years of age, courted this 15 year old child with much fervor during the spring and summer of 1918. She says that they were engaged to be married in August of that year on the day preceding her 16th birthday; that she asked him if he didn't think she was too young and too poor for him and that he said she was not too young and that he didn't care if she had no more than one dress on her back etc.

She says she told him she would marry him, but was scared because he might be called to war, might be drafted and that he replied, "all right, as soon as peace is signed, why, we will get married". Her father says that plaintiff in error asked him for his daughter. Her sister and brother-in-law say that he told them that they were engaged and would be married soon. Her brother says that plaintiff in error told him that he would soon be his brother-in-law. While plaintiff in error denies that they were engaged and denies that he ever told the said several parties that they were, yet there is sufficient evidence to support the contention of defendant in error in that regard.

Plaintiff in error visited her frequently and took her out in his car until Oct. 9th, 1918. On the evening of that day he took her for a ride and when out in the country stopped the car and pretended something was out of order. Just what occurred at that time does not fully appear, but she says that he made an indecent proposal and tore her clothing. She was very much offended and properly so, and did not talk to him again until Nov. 28th, when they met by chance at the home of her friend. She says that he then asked her to kiss and make up, but she refused; that she told him she was not mad and would go back with him if he would quit going with another girl. He denies that such a conversation occurred. She says that she knew he had tried to get her

on the phone several times between Oct. 9th and Nov 28th but that she never called him.

She admits that she stated at various times between Oct. 9th and Nov. 28th that she was angry at him for what he had done and that she would have nothing to do with him unless he apologized and that he had never done so. They did not meet again after Nov. 28th until about Jan. 4th, 1919. She says that about the first of January she consulted a lawyer about bringing a suit for damages, and that he advised her to first write plaintiff in error and ask him what he was going to do. She says she wrote the letter and received no reply and that the lawyer then advised her to go to Madison and see him and see what he was going to do about it, which she did.

Her version of the conversation that occurred on Jan. 4th clearly indicates that she was there more for the purpose of obtaining a definite refusal from him than a performance of the marriage contract. From Oct. 9th to Jan. 4th her attitude had been that she would have nothing more to do with him unless he apologized and this he had failed to do. When she went to see him at the suggestion of her lawyer, she did not say whether she would marry him or that she was ready to do so, or that her previous attitude had changed, but simply asked him what he was going to do. She says he replied, "Well, I tell you, I can't say yes and I can't say no", and that later he said, "Well, Helen, I changed my mind. I am not going to get married at all." She made no remonstrance, did not remind him of their marriage contract and made no suggestion that she was ready and willing to marry him and never intimated that he should marry her.

His conduct toward her on Oct. 9th was of a most reprehensible character and fully justified her in breaking the engagement. Thereafter she avoided him in every way until she decided to sue him, and her conduct clearly indicated she was through with him unless he apologized. In taking that position she was acting within her legal rights, but his misconduct of Oct. 9th would not entitle her to recover damages for the breach of a contract which she was no longer willing to perform except upon conditions which he would not meet.

If she desired the benefit of the marriage contract, or to recover damages for a breach thereof, the law required her to be ready and willing to take him with all of his faults. She could not repudiate the contract, even though for sufficient reasons, and at the same time recover damages for a breach on his part.

We are of the opinion that under the evidence in the record the court erred in refusing to direct a verdict in favor of plaintiff in error. Some of the instructions given on behalf of defendant in error are clearly erroneous, but under our view of the case it is unnecessary to pass upon them.

The judgment is reversed and the cause remanded.

Reversed and Remanded.

Not to be reported in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

MARCH TERM, A. D. 1922

2261.A. 654

CHARLES BRUSSEL,

Appellee,

vs.

EARL C. HUGGINS, et al,
Appellants.

} Appeal From Marion
Circuit Court.

OPINION BY BARRY, J.

Appellants sold certain real estate to appellee for \$14,500.00. He had no money to pay on the purchase price but was expecting soon to receive \$4,200.00 from John Merchant, out of which he was to make a cash payment of \$4,000.00. All of the parties fully understood that said sum was all he could pay and that said payment could not be made until he collected from Mr. Merchant. It is equally clear that appellants knew that he could only pay the balance of the consideration by obtaining a loan on the property and in case he was not able to obtain a loan for \$10,500.00 appellants agreed to accept a second mortgage on the premises for as much as \$1,000.00 payable on such terms as might be agreed upon that would enable him to pay it in yearly payments. These facts are evidenced by the following paragraphs of the written contract which was entered into on March 31, 1920.

"Fourth. It is agreed and understood between all the parties hereto that the said party of the second part has entered into a contract with one John Merchant, in and by which said contract, the said John Merchant has agreed to pay to the said John Brussel the sum of \$4,200. on or about thirty days from date, and that the said Charles Brussel cannot make an advance payment until said sum is paid to him by the said John Merchant; and further, that the said parties of the first part are willing to receive their advance payment at such time as the said John Merchant shall pay the said Charles Brussel and the said Charles Brussel is willing to make such advance payment to the said parties of the first part on the same day as he receives said sum from the said John Merchant."

"Seventh. It is understood and agreed by and between the parties hereto that the said Charles Brussel can only pay the balance on the consideration for said tracts of land by obtaining a loan thereon and it is agreed by the said parties

of the first part that he may make the payment of the balance due in such manner; that the loan can probably not be secured before the month of July next, but that they will receive the same at any time prior to that date or afterwards if no loan can be secured until later, but under no circumstances shall the party of the second part be required to make payment of the balance until March 1st, 1921, and the said parties of the first part will prepare their deeds to their respective tracts and deposit them in any bank for delivery upon the conclusion of any loan and payment of balance due."

"Eleventh. It is also agreed by the said parties of the first part that if the said party of the second part is unable to obtain a loan quite large enough to cover the balance due the said parties of the first part that they or one of them will accept a second mortgage on said premises for as much as one thousand dollars, payable on such terms as may be agreed upon that will enable the said party of the second part to pay it in yearly payments."

On June 30, 1920, appellee was informed by appellants that Mr. Merchant was ready to pay the \$4,200.00 and appellee authorized Mr. Huggins to collect and receipt for the same, which he did, and \$4,000.00 was credited on the contract. Mr. Merchant, however, paid but \$3,400.00 for the reason that appellants were so anxious to get the money they allowed him a discount of \$800.00 without informing appellee of that fact. Appellee received \$200.00 of the \$3,400.00 paid by Merchant.

During the summer of 1920 appellee learned that appellants had not procured a loan for him and that a loan on the premises could not be secured for anything like \$10,500.00 and demanded that appellants pay him back the \$4,000.00 and before the time for performance of the contract had expired he filed this suit to rescind and cancel the contract and to recover the \$4,000.00 and interest thereon. In his bill he charged, among other things, that it was fully understood and agreed between the parties, before the contract was entered into, that appellee could only carry out the contract by placing a mortgage on the premises for the balance of the purchase over and above the \$4,000.00; that appellants represented to him that they had already procured for him a loan for the balance of the purchase price before he signed the contract; that said representation was false and fraudulent and the land was not worth \$14,500.00 but much less than that sum and that a loan could not be procured on the premises for more than \$6,000.00.

The chancellor heard the testimony in open court and rendered a decree in favor of appellee in which he found, among other things, that the foregoing averments of the bill were true and decreed that the contract be cancelled and surrendered and that appellants pay to appellee \$3,200.00 with interest and costs of suit. The evidence clearly shows that before the contract was entered into appellants endeavored to procure a loan of \$10,000.00 for appellee on the premises. In fact Mr. Huggins admits that he took appellee to St. Peter and introduced him to Mr. Gluesenkemp and to Mr. Von

Baron, cashier of the First National Bank at that place. Mr. Huggins admits that he told those men that he and Mr. Lacy were to sell appellee their farms if he could get his \$4,000.00 from Mr. Merchant, and that appellee needed a loan of \$10,000.00 or thereabouts. Mr. Von Baron replied that his bank didn't have the money at that time but that he had some customers who did and that he would let Mr. Huggins know soon.

Mr. Lacy admits that before the contract was entered into he told appellee that he had seen a Mr. Maxon about getting the loan and that he said he would have the money about strawberry or threshing time, and thought he could handle the loan and would then come down and look at the land. Appellee testified that appellants told him that they had arranged for the loan before he signed the contract. No loan was procured by appellants and appellee was unable to secure one.

From the recitals of the contract and all of the facts and circumstances disclosed by the evidence, we think it fairly appears that appellants understood and agreed that appellee could not carry out the proposed contract unless he got his money from Mr. Merchant and a loan for the balance of the purchase price and that they were to procure the loan. The evidence discloses that the land was not worth more than \$8,500.00, whereas appellee was to pay \$14,500.00 therefor, and a mortgage could not be procured for more than \$6,000.00. Appellants filed a cross bill setting out that they had at all times been ready, able and willing to carry out the contract, but appellee had refused to perform and for that reason asked that the contract be cancelled and they be permitted to retain the \$4,000.00 paid thereon by appellee. They did not aver or prove that they ever made a tender to appellee nor is there a forfeiture clause in the contract. Money paid upon a contract which is subsequently rescinded is never forfeited unless there is an express or implied contract to that effect, and upon such rescission the money paid must be returned to him who advanced it. 6 R. C. L. 943.

If appellants were to procure a loan for appellee and failed to do so they were never ready to complete the contract and are in no position to claim a forfeiture. *Boston vs. Clifford* 68 Ill. 67. It necessarily follows that the court did not err in dismissing the cross-bill.

Appellants having failed to procure the loan as they agreed to do, appellee was entitled to rescind the contract and recover the advance payment without regard to whether or not a fraud was practiced upon him. In our view of the case it is unnecessary to consider the other questions raised and discussed by counsel. The decree is affirmed.

Affirmed.

Not to be reported in full.

Term No. 57.

Agenda No. 46.

MARCH TERM, A. D. 1922.

MAHALA D. CHAMPE,

Appellee.

vs.

CITY OF ALTON,

Appellant.

Appeal
from Madison
Circuit Court.

226 T. A. 655

OPINION BY BARRY, J.

Appellee sued to recover damages for a personal injury alleged to have been caused by accidentally stepping into an excavation in one of the streets of the city. She was a resident of St. Louis and went to Alton to visit her sister, as she had done on several previous occasions. She took the route to her sister's home that she had usually taken, but since her last visit an excavation had been made at the foot of the hill. There was no sidewalk along the street in question, but she and other witnesses testified that she was walking along the beaten path on the sidewalk line and which led to the excavation, which was not visible to one coming down the hill. There was also evidence tending to show that there was another beaten path around the hill leading into the street, and appellant insists that she was guilty of contributory negligence because she failed to take the path last mentioned.

We are of the opinion, after a careful consideration of all the evidence, that the questions of negligence and contributory negligence were questions of fact for the jury, and we would not be warranted in holding that their verdict is against the weight of the evidence.

Complaint is made of that part of the second instruction given for appellee which reads: "The jury are instructed that the defendant, City of Alton, is bound to use reasonable care and precaution to keep and maintain its streets and sidewalks in good and sufficient repair to render them reasonably safe for all persons lawfully passing on or over the same."

It is argued that this placed an absolute duty on appellant to keep its streets reasonably safe, whereas it was only bound to use reasonable care and diligence to keep them in a reasonably safe condition for travel.

In our opinion the instruction is not subject to the criticism urged against it. It only required the city to use reasonable care to keep them in good and sufficient repair *to render them reasonably safe for travel*. The "good and sufficient" repair is only to the extent of rendering them reasonably safe. This conclusion is supported by the following cases: Village of

Sorento vs. Johnson, 52 App., 659; Brennan vs. City of Streator, 168 App., 134-138; City of Sandwich vs. Dolan, 141 Ill., 430-436; City of Gibson vs. Murray, 216 Ill., 589; Purcell vs. City of Chicago, 231 Ill., 164. There is no reversible error and the judgment is affirmed.

Affirmed.

Not to be reported in full.

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

MARCH TERM, A. D. 1922.

THE PEERLESS PATTERN
COMPANY, A CORPORATION,
Appellant,

vs.

J. H. NYBERG and JOHN W.
COKER, partners, under the firm
name and style of NYBERG &
COKER,
Appellee.

Appeal from
Circuit Court
Saline County, Illinois.

OPINION BY BOGGS, J.

On September 19, 1912, appellant entered into a contract with appellees who were in business at Harrisburg, Illinois, in and by which appellees were to sell dress patterns to be furnished by appellant company. Said contract being in the form of an order provided for an initial shipment of patterns, etc., to the value of \$200. This shipment was to stand as a debit until the termination of the contract, and was to bear interest until paid. Said contract further provided for shipments of patterns not exceeding one hundred and fifty per month and also for the return of all patterns out of style, for which credit was to be given at purchase price. Said discarded patterns were to be returned January and July, of each year, upon receipt of notice from appellant company that such patterns were to be marked as out of style. Said contract further provided that payments should be made on or before the tenth of the month following shipment. Said contract was to remain in force for two years "and from term to term thereafter unless either party is given written notice of desire to cancel within thirty days before the expiration of any term."

Upon termination of said contract all patterns in good salable condition were to be returned at purchase price to be applied on the payment of said \$200, provided that the terms of the contract and all conditions have been lived up to. Said parties operated under said contract some two years when a controversy arose as to the construction of that part of said contract reading as follows:

"It is agreed that you are to credit our current account with full purchase price on all patterns returned

by us and received by you as under discard and out of style and unsalable in January and July it being understood that said credit is not to be used to pay past due accounts.”

Appellant failed to notify appellees as to the discarded patterns in July and January, of each year, as specified in said contract and appellees ceased paying their bills at the time specified in the contract. It is the contention of appellees that before they should be compelled to pay for the goods purchased they would be entitled to a list of the discarded patterns in order that they might return the same and obtain credit therefor on their bill. On the other hand appellant contends that appellees had no right to insist upon having a list of the discarded patterns until they had paid in full the amount owing by them.

Appellant brought an action in assumpsit against appellees for patterns furnished. To the declaration a plea of the general issue was filed and a stipulation was made that any defenses proper under special pleas might be given in evidence under the general issue. A trial was had resulting in a verdict and judgment in favor of appellant for \$120.54. Appellant being dissatisfied with the amount of said judgment perfected an appeal to this court to reverse the same.

The record discloses that in 1917 appellant by reason of the refusal of appellees to pay said bills declared said contract terminated and refused them any more goods. The record discloses that at that time, with the \$200 heretofore mentioned, appellant's bill amounted to \$320.54. Appellees did not seriously contend that this amount was not correct, but insisted upon the trial that if they were credited for the patterns on hands at the purchase price that they would only owe appellant \$4.87. Appellees make a tender of said amount, together with the costs accruing to date of the trial.

It is first contended by appellant that the court erred in its ruling on the instructions. We have examined the instructions and are of the opinion that the ruling of the court thereon was substantially correct.

It is next insisted by appellant that the verdict of the jury is against the manifest weight of the evidence. Before appellant could rightfully insist upon appellees paying the amount owing by them for patterns furnished from time to time by appellant it would be appellant's duty to furnish appellees the discarded or out of style lists, as provided by said contract in order that appellees might return said patterns and receive credit therefor.

Appellant does not contend that there was any serious error in the ruling of the court on the evidence, it was therefore for the jury to say what facts had been proven and an examination of the record convinces us that the finding of the jury is not against the manifest weight of the evidence. That being the state of the record the verdict and judgment thereon should not be disturbed.

Mellish-Heywood Co. vs. R. Haas Electric & Mfg. Company, 181 Ill., App. 664;

Atkins vs. Vreeland, 170 Ill., App. 410;

Mausley vs. McMullen, 169 Ill., App. 326;

Finding no reversible error in the record, the judgment of
the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

Term No. 10

Agenda No. 48

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

MARCH TERM, A. D. 1922

226 T. A. 655

MATHEW KING,

Plaintiff in Error,

vs.

THE CHICAGO & ALTON RAIL-
ROAD COMPANY and JOHN
BARTON PAYNE, Director
General of Railroads, as Agent.
Defendants in Error.

Error to the
Circuit Court of
Madison County.

Opinion by BOGGS, J.

On the evening of January 1, 1921, plaintiff in error, (hereafter called plaintiff), while crossing defendant in error's tracks, (hereafter called defendant), on Ferguson Avenue in the Village of Wood River, Madison County, was struck and injured by an engine of one of defendant's passenger trains. An action on the case was instituted by plaintiff against defendant, in the Circuit Court of said County, to recover for said injuries. The declaration consists of four counts; the first count charges a failure to ring a bell or sound a whistle as provided by statute; the second count charges a violation of an ordinance limiting the speed of trains through said village to ten miles per hour. The third count charges general negligence in the operation of said train; and the fourth count charges a failure to have a head-light lit on the engine of the train in question, as provided by statute. Each of said counts alleged due care on the part of the plaintiff. To said declaration the defendant filed a plea of the general issue. A trial was had and at the close of plaintiff's evidence the Court, on motion of defendant, excluded the evidence and directed a verdict of not guilty. To reverse said judgment this Writ of Error is prosecuted.

Counsel for defendant concede that the evidence in the record tends to prove negligence on the part of defendant in the operation of its said train, as charged in plaintiff's declaration. So the only question for us to determine is as to whether or not taking the evidence in the record as true, with all the reasonable inferences to be drawn therefrom, it affirmatively appears that prior to and at the time of the injury, plaintiff was in the exercise of ordinary care for his own safety. *Boyle v. I. C. R. R. Co.* 88 App. 1; *Kluska v. City of Chicago*, 97 Ill. App. 665.

The record discloses that the tracks of defendant, as laid through said village, run practically in a northerly and southerly direction, and Ferguson Avenue crosses said tracks at right angles. Defendant's train, on the evening in question, being about 5:15 P. M., was being operated at a speed of about thirty-five miles per hour as it crossed Ferguson Avenue.

SEP 28 1922

The pilot beam on the engine on the west side struck plaintiff causing the injury complained of, which consists of a permanent injury to his hand and arm, together with certain other injuries of less serious character. On the trial plaintiff testified: "As I started to cross the tracks of the Chicago & Alton Railroad Company, I looked both ways, north and south; I didn't see any train coming; I heard no whistle and didn't hear any bell ring; I didn't see any headlight. The train struck me and knocked me off the track and I lost consciousness. It was about 5:15 in the evening when I went across the tracks; the weather was kind of foggy and it was New Year's Day; the sun was down and it was getting dark." On cross examination plaintiff testified: "I started to go home about five o'clock. I had been drinking some that afternoon—had two drinks of whisky, got it from a friend of mine. * * * * We had about two drinks, but we drank it out of a bottle and he had been with me I guess from around about half past two or three o'clock until I started home. The whisky was not all gone; I had some in the bottle yet." There were four sets of tracks crossing Ferguson Avenue on the east of defendant's tracks; just east of defendant's track was the track of the Big Four Railroad Company, and east of the Big Four Railroad tracks was some switch tracks. The record also discloses that there was some box cars on the switch tracks just north of Ferguson Avenue. There was also a line of telephone poles running north and south to the east of the tracks of defendant's railroad.

It is the contention of counsel for plaintiff that said box cars and the line of telephone poles obscured plaintiff's vision toward the north, the direction from which the train in question was coming. An examination of the record, however, discloses that after plaintiff crossed the switch tracks, on which said box cars were located, he had a clear line of vision looking north up defendant's tracks except for said telephone poles. Plaintiff testified on cross examination in connection therewith: "I did not see the train because there was no light on it; there was no light on the box cars either; but I had no trouble in seeing them; after I got by the box cars and during the time I was walking the hundred steps I don't know why I didn't see the train! when I looked north there was nothing between me and the approaching train except the telephone poles. I crossed five railroad tracks before I reached the C. & A. track; the C. & A. were the farthest ones west and the box cars I mentioned were on the track farthest east; after I passed the tracks the cars were on I crossed four more tracks before I got to the C. & A." Frank Cross, ticket agent at Wood River, for the Alton, Granite City and St. Louis Traction Company, a witness for plaintiff, testified on cross examination: "From the window out of which I was looking, I could see north up the C. & A. tracks. I was in the room about twenty feet west of the C. & A. track when this train approached from the north. I had a clear view up the track. * * * * The train was probably six or seven hundred yards away when I first noticed it, and I saw the train all the way down to the crossing. The train made considerable noise." The only other witness for plaintiff, except the doctor who testified with reference to plain-

tiff's injuries, and the Village Clerk, was Edward Heying, a boy twelve years of age. He testified that plaintiff was just across the west rail of the track when the train struck him. In addition to testimony of these witnesses, plaintiff offered in evidence the ordinance relied on in the second count of the declaration.

Ordinarily contributory negligence is a question of fact for the injury, and only becomes one of law when the undisputed evidence establishes that the accident resulted from the negligence of the injured party. If there may be a difference of opinion on the question so that reasonable minds will arrive at different conclusions, then it is a question for the jury. *Heidenreich v. Bremner*, 260 Ill. 452, citing *Chicago City Railway Co. v. Nelson*, 215 Ill. 436. But if, from the facts in evidence, with all reasonable inferences to be drawn therefrom, all reasonable minds would draw the conclusion that the person injured was negligent and that his negligence contributed to his injury, then as a matter of law the Court should declare that the injured party was not in the exercise of due care for his own safety. *Lake Street Electric Railway Co. v. Gormley*, 108 App. 59; *Livingston Warehouse Co. v. A. E. & C. R. R. Co.*, 107 Ill. App., 244.

It is contended by counsel for plaintiff that the testimony on the part of plaintiff is to the effect that he looked both north and south along the line of defendant's tracks as he approached said crossing, and that he did not see the train in question as it approached said crossing. The evidence, however, is to the effect that plaintiff's view as he approached said crossing from the east was unobstructed except for said telephone poles and that said telephone poles did not obstruct his line of vision when near said track. The evidence of one of his own witnesses is that the train was making considerable noise, and that he, said witness, saw said train from a point twenty feet east of said track for from six to seven hundred yards up the track and continuously as it approached said crossing, so that it would seem that the physical facts placed in the evidence by the plaintiff himself, would go in proof that he could not have been looking, for if he had looked to the north along defendant's track he would have seen said train approaching. In *Vastardes v. C. & A. R. R. Co.*, 210 App. 546 this Court held:

"Where one approaches a railroad crossing upon a highway, it is his duty to look and listen for approaching trains, if a reasonably prudent person so situated would look and listen; and a failure to so look and listen precludes a recovery where to have looked and listened would have prevented the injury, and where there were no circumstances or conditions justifying such failure to look and listen."

There is no evidence in this record that would excuse plaintiff from looking and listening as he approached said crossing.

In *Livingston Warehouse Co. etc. v. A. E. & C. R. R. Co.*, 170 Ill. App. 244, the Court, at page 248, says:

"It is usually a question of fact for the jury to determine, in view of all the surrounding circumstances, whether failure to look and listen constitutes negligence or lack of due care." *Winn v. C. C. C. & St. L. Ry. Co.*, 239 Ill. 132, 139.

But in the case at bar we cannot discover any conditions or circumstances which excused Gehring for not looking before he drove onto defendant's tracks. He was familiar with his surroundings; his horses were walking; he had a light load; his seat was elevated; the sides of his wagon did not prevent his looking to the right or left; and his view of the track eastward was unobstructed for nearly a mile. He could clearly have seen the headlight of the approaching train in ample time to have stopped and allowed the train to pass. Neither can we perceive any reason why he should not have heard the warning whistle of the approaching train in ample time to have avoided danger. As to the statement of Gehring that he looked while at the Northwestern tracks and saw nothing, we quote from *C. P. & St. L. Ry. Co. v. DeFreitas*, 109 Ill. App. 104, 106:

"If a person looks, he is supposed to look for the purpose of seeing; and if the object is in plain sight and he apparently looks, but does not see it, it is manifest he does not do what he appears to do. The law will not tolerate the absurdity of allowing a person to testify that he looked, but did not see the train, when the view was unobstructed, and where if he had properly exercised his sight, he must have seen it."

The evidence in the case at bar is to the effect that plaintiff was familiar with this crossing; that he had crossed it daily for at least three months prior to the injury, so that as far as the record discloses there was no excuse for the plaintiff failing to look and listen for the approach of the train as he was attempting to cross defendant's tracks. The evidence further shows that had he looked and listened he would have seen and heard the train approaching. It might be observed in this case that the record discloses that plaintiff had been drinking that afternoon and that may have had something to do in bringing about this injury. The record further discloses that after the plaintiff got out of the hospital he called on the tower man to find out as to which direction the train was moving that struck him.

We are, therefore, of the opinion and so hold that the plaintiff was guilty of contributory negligence on his own showing and that the Court did not err in directing a verdict for the defendant.

For the reasons above set forth, the judgment of the trial court will be affirmed.

Judgment Affirmed.

Not to be reported in full.

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

MARCH TERM, A. D. 1922

SUSAN P. LEMEN, a Minor, by
Gladys L. Lemen, Her Mother
and Next Friend,

Defendant in Error,

vs.

JOHN BARTON PAYNE, Direct-
or General of Railroads, as
Agent, Operating the Chicago &
Alton Railroad Company,
Plaintiff in Error.

226 I.A. 655
Error to the
City Court of
Alton, Illinois.

Opinion by BOGGS, J.

Susan P. Lemen, a minor, defendant in error (hereinafter called plaintiff), by Gladys L. Lemen, her mother, next friend, recovered a judgment of \$8,000 in an action on the case in the City Court of Alton, against John Barton Payne, Director General of Railroads, as agent for the Chicago and Alton Railroad Company, (hereinafter designated defendant) for injuries sustained by plaintiff when an automobile in which she was riding collided with a passenger train operated by defendant, at a street crossing in the City of Alton. To reverse said judgment, defendant prosecutes this Writ of Error.

The declaration as finally amended contained four counts. The first count charged general negligence in the operation of said train; the second count alleged the failure to sound a whistle or ring a bell; the third count charges the failure to keep and maintain a flagman at the crossing intersection of Ninth and Piasa Streets, where the accident occurred; the fourth count charges the defendant with violating the city ordinance in running its train at a speed greater than ten miles per hour.

During the trial on motion of defendant, the court directed a verdict in his favor as to the first and second counts, so that the case went to the jury on the charges of negligence contained in the third and fourth counts.

It is first contended by defendant that the plaintiff was not in the exercise of due care for her own safety just prior to and at the time of the accident, and that the court erred in failing to direct a verdict for defendant on his motion at the close of the plaintiff's evidence and again at the close of all the evidence. The record discloses that Piasa Street runs north and south in the City of Alton, and Ninth Street runs east and west. The tracks of the Chicago and Alton Railroad extend over and along Piasa Street from a point near Front Street on the levy northward to about Twelfth Street, passing a roundhouse, curving around that structure to the north-east and curving northwardly through the city and on to Godfrey Junction some four miles distant. The grade of the

railroad tracks in going north on Piasa Street is such that two engines are required to pull a heavy train. On the west side of Piasa Street, north of Ninth, was a stone wall seven feet high, on which was constructed a two-story brick building. This wall extends along the north side of Ninth Street to the west line of Piasa Street, interfering to some extent with a clear view of the tracks north of the crossing to one approaching from the west until he would get on the intersection of said street.

On February 21, 1920, the day in question, plaintiff in error was operating a passenger train consisting of an engine and four cars southward over said tracks, on a down grade toward the Union Station. The train was late and had been running at a speed of about fifty miles per hour. At the time it crossed Ninth Street its speed was estimated by the witnesses in said cause at from fifteen to thirty-five miles per hour. Plaintiff and her father had left their home and came on Ninth Street to the Bluff Street crossing and then proceeded eastwardly towards the Piasa Street crossing where the accident in question occurred. There is a conflict in the evidence with reference to the speed at which the automobile was running just prior to and at the time of the collision. The witnesses on the part of plaintiff testified to the effect that the automobile was being operated at a speed of from nine to ten miles per hour, while the evidence on the part of defendant is to the effect that said car was being operated at a speed of about twenty miles per hour. The greater weight of the evidence is to the effect that the front of the engine had passed before the automobile had collided therewith. The evidence being that the side of the engine or tender came in contact with the automobile at the time of the impact. Plaintiff's father was killed in said accident and plaintiff received the injuries for which this suit is brought.

It was a controverted question on the trial as to whether or not the crossing watchman of the defendant was attending to his duties just prior to and at the time of the accident. The witnesses on the part of plaintiff testified to the effect that the watchman was not to be seen on or near the street just prior to and at the time of the accident, while the testimony on the part of certain of the witnesses for the defendant was to the effect that the watchman was in the street where he should have been, and had in his hand a stop signal which he was displaying as plaintiff in error and her father were approaching said crossing. It was a question under the conflicting evidence for the jury as to whether or not defendant's watchman was performing his duties at the time in question. Plaintiff in error, at the time of the accident, was fourteen years of age, and under the law it was her duty to exercise such care for her own safety as a person of her age, intelligence, experience and capacity would have exercised under the same or similar circumstances. (*Pienta v. Chicago City Railway Co.*, 284 Ill. 246; *Opp v. Prior*, 294 Ill. 538).

It is also the law in this state that the negligence of the driver of an automobile in which another is riding is not imputed to such person. (*Flynn v. City of Chicago Railway Co.*, 250 Ill. 460-464; *Pienta v. Chicago City Railway Co.*, 284 Ill. 246-259.) It was seriously contended on the part of the defendant in this case that Dr. Lemen, plaintiff's father, was negligent in the operation of said car just prior to and at the time of the injury, and that his negligence was the sole cause of the injury. We do not agree with counsel for defendant

on this proposition. The evidence in the record clearly tended to show that the servants of defendant were operating the train in question through the City of Alton and across Ninth Street at the place of the injury greatly in excess of ten miles per hour. In fact the engineer himself testified that he had been running about fifty miles per hour, but that at the time of the injury his engine was running about twenty miles per hour. The ordinance of the City of Alton limiting the speed of trains running within said city to ten miles per hour, was admitted in evidence. Under the statutes of this state it is prima facie negligence for a railroad company to operate its trains through a city in excess of the speed fixed by the ordinances of such city. (Cahill, Revised Statutes, Chap. 114, paragraph 103; L. & St. L. Consolidated Railroad Company v. Gobin, 52 Ill. App. 565; C. B. & Q. R. Co. v. Sack, 136 Ill. App. 425; Wabash Railway Co. v. Kamradt, 109 Ill. App. 203).

In view of the fact that the evidence showed that the view of a driver of an automobile on Ninth Street approaching said railway crossing from the west, was more or less obstructed, it was for the jury to say as to whether or not the operation of a train at the rate of twenty miles per hour, in violation of the city ordinance, approximately contributed to the injury in question.

Several witnesses on the part of defendant testified that immediately after the injury plaintiff stated that she saw the train but that her father thought he could get across. Some of the witnesses testified that plaintiff stated that she saw the train and informed her father, but that her father thought he could get across. Counsel for defendant seems to be of the opinion that this evidence clearly showed that plaintiff was guilty of contributory negligence and was not in the exercise of ordinary care for her own safety prior to and at the time of the injury. In our view of the evidence the fact that she saw the train and called her father's attention to it would tend to show she was in the exercise of due care for her own safety. We do not think that a child fourteen years of age should be held guilty of contributory negligence because she did not request or demand that her father, who was driving the car, should stop the same and not attempt to make the railroad crossing ahead of a train. At any rate it certainly was a question for the jury and we are not disposed to disturb their finding.

It is next insisted by counsel for defendant that the court erred in its rulings on the instructions. It is first contended that the court erred in giving the first instruction given on behalf of the plaintiff for the reason it omits any reference to the speed of the train being the approximate cause of the injury. We have examined this instruction in the light of the criticism made, but are of the opinion that this instruction is substantially correct. All of the evidence in this case is to the effect that the train in question was being operated at a speed greater than ten miles per hour, the speed fixed by the ordinance of the city. The law makes it prima facie negligent to so operate the same.

It was also contended that the court erred in giving the second instruction given on behalf of plaintiff, for the reason that it refers to the declaration or the negligence charge in the third and fourth count thereof. While it has been held that the proper practice is for the court to instruct the jury as to the issues in the case, at the same time the court, in discussing this matter, has held that the defendant has the right to submit instructions clearly setting forth the issues to be

tried in the case. This holding is applicable here, at any rate the court has never held, so far as we are advised, that the giving of an instruction of this character is reversible error.

It is next contended by counsel for defendant that the court erred in giving the third instruction given on behalf of plaintiff. This instruction is with reference to the measure of damages. The complaint is that the instruction directs the jury that in allowing the amount of damages "the plaintiff is entitled to recover, if any, you should take into consideration all the facts and circumstances in evidence before you, etc." We are of the opinion that the criticism of this instruction is well taken, that the instruction should not have directed the jury to take into consideration "all the facts and circumstances surrounding the case" in determining the amount of damages. The objection to this instruction, however, is not, in our opinion, of sufficient importance to require a reversal of the case. It is also contended that the court erred in giving the fourth instruction given on behalf of the plaintiff. We do not think there is any serious objection to this instruction, especially in view of the fact that one of the instructions given by the court on behalf of the defendant is of the same character. It might be observed in this connection that the instruction complained of did not direct a verdict and that the court fully instructed the jury on behalf of the defendant as to each phase of his case. The court gave twenty-one instructions on behalf of the defendant, while it only gave seven instructions for the plaintiff, three of which were of a general character.

One of the assignments of error in the records is that the verdict is excessive. While this assignment of error is contained on the record, counsel for defendant has practically abandoned the same in the argument. The damages, in our judgment, were amply large. However, the record discloses that the plaintiff received a serious injury and to some extent a permanent one. She suffered a fracture of the left femur or thigh bone, a deep laceration on said limb below the knee, a lacerated wound above the right eye from one to one and one-half inches in length, a cut about two and a half inches on the back of her left wrist, and a cut on the back of the right wrist severing the extension tendon. As a result of the latter injury plaintiff is not able to shut her right hand as she formerly did. Her injured limb is shorter than the other one, and the evidence tends to show that in damp weather she suffers pain from it, and that she is nervous and easily excited. We are not authorized to set aside a judgment on account of the size of the verdict unless we are able to say the jury, in fixing the amount of the same, were moved by prejudice or passion.

Lastly it is contended by counsel for defendant that counsel for plaintiff submitted to an interview during the trial of this case, at which he stated in effect that he was of the opinion that he was making a stronger case for the plaintiff than had been made in the case brought for the death of her father. We have examined this article and the record in connection therewith, and are of the opinion that there is nothing in the record tending to show that counsel for plaintiff was responsible for said article or that the article in question ever came to the notice of any of the jurors or in anywise had anything to do with the verdict in this case. Find no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment Affirmed.

Not to be reported in full.

Term No. 25

Agenda No. 29

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

MARCH TERM, A. D. 1922.

MIKE MUKELOFF, SAM SARI-
CISOFF and SAM KARABA-
DOFF,

Appellants.

vs.

WILSON MUKELOFF, and SAM
A. NOVIAN,

Appellees.

Appeal from the
Circuit Court of
Madison County.

Opinion by Boggs, J.

This is an action in forcible entry and detainer, brought in a justice court in Madison County, wherein appellees sued for and recovered a judgment for the possession of forty acres of farm land, in the town of Woodriver. Upon appeal to the Circuit Court a verdict was rendered in favor of appellees, and judgment was entered against appellants for possession of said premises and for costs. To reverse said judgment appellants prosecute this appeal.

The record discloses that in 1916 one Ben S. Sawyer, the then owner of said property, leased the same to Majk Smith and Cadi Ritter for a period of four years and eleven months, from April 1, 1916. Before the expiration of said lease, Sawyer died, testate, devising said forty acre tract to one Henrietta Williams, a cousin, for life with remainder to his brothers, Fred Sawyer and C. E. Sawyer. Fred Sawyer died in February, 1918, after the death of Ben Sawyer. C. E. Sawyer was appointed administrator of each of said estates. During the life of the lease to Smith and Ritter, they assigned the same to appellee, Wilson Mukeloff. Thereafter Mukeloff assigned said lease by bill of sale, to appellant, who went into possession of the premises under said lease. During the time the appellants held the property after the death of Ben Sawyer they paid rent to said C. E. Sawyer. By its terms, said lease expired on February 28, 1921. On January 31, 1921, C. E. Sawyer executed a lease for said premises to appellees to run from March 1, 1921, to February 28th, 1925, for a certain cash rent to be paid in manner therein specified. Appellants still being in possession of said premises, appellees, on March 1, 1921, duly served appellants with a written demand for the immediate possession of said premises. Appellants having failed to surrender possession of said premises pursuant to said demand the suit above mentioned was instituted.

It is first contended by appellants that the Court erred in its rulings on the evidence. On the trial of said cause the lease executed by Sawyer to appellee, dated January 31, 1921, the ground of said objection being that the undisputed evidence was to the effect that Henrietta Williams was the owner of a life estate in said premises under the Will of Ben Sawyer, deceased.

and that she only was entitled to execute a lease on said premises, and that the lease in question did not purport to be made by her or on her behalf. The Court overruled said objection and admitted said lease in evidence. In connection with said lease appellee offered testimony to the effect that Henrietta Williams was an old lady past eighty years of age, a first cousin of C. E. Sawyer and that he transacted her business. This evidence was also objected to, but the Court admitted the same. We are of the opinion that the Court erred in admitting said lease, and admitting testimony to the effect that Sawyer had been transacting her business. The lease in question is a writing under seal, is clear and unambiguous in its terms, and purported to be made by C. E. Sawyer on his own behalf as lessor. That being the state of the record, extrinsic evidence is not admissible to explain or alter the terms of said written instrument. *Ryan v. Cook* 172 Ill. 302; *Vale v. Northwestern Life Insurance Co.*, 192 Ill. 567.

It is next contended by appellant that appellees are not in a position to question the authority of C. E. Sawyer to rent said premises for the reason it is claimed that appellees were tenants of Sawyer and that they cannot question the title of their landlord. The law is so fundamental and well recognized that a tenant cannot dispute the title of his landlord that it is not necessary to discuss this proposition, but the question arises as to whether or not appellees were tenants of C. E. Sawyer. The record in this case discloses that prior to and at the time of his death, Ben S. Sawyer, brother of C. E. Sawyer, was the owner of said premises; that during his lifetime as hereinabove stated, he rented said premises to Smith and Ritter; that Smith and Ritter assigned said lease to appellee Wilson Mukeloff; that Mukeloff thereafter assigned the same to appellants, who went into possession thereunder and that no lease other than this one was ever made to appellants. It, therefore, clearly appears that appellants are not tenants of C. E. Sawyer and the mere fact they paid rent to C. E. Sawyer who was the administrator of the estate of Ben Sawyer, deceased, does not estop them in denying that C. E. Sawyer was the owner of said premises and entitled to rent the same. In fact C. E. Sawyer admits that Henrietta Williams is the owner of a life estate in said premises and that all he has is a remainder therein. We, therefore, hold that the rule of law relied on by appellee to the effect that a tenant cannot dispute the title of his landlord does not apply in this case. It might be observed too, in connection with the position of appellants, that prior to the expiration of the lease given by Ben Sawyer to Smith and Ritter, and under which appellants were holding they applied to Sawyer for a new lease on said premises and that Sawyer promised to execute a lease to them therefor, and that he stated to them that they could go on and make certain improvements on said premises, that they were contemplating, and that they did make such improvements in reliance thereon. Appellants insist that this evidence tends to support their theory, that appellees were the tenants of Sawyer and therefore cannot dispute his title, and the right to rent said premises. In our view of the law this evidence is not very material. It does not assist appellants' case to any extent for the reason that the making of improvements under an oral lease, void under the Statute of Frauds, cannot be relied upon except in a Court of Equity. It does not assist appellees' case for the reason that it is conceded in the

record that Henrietta Williams is the owner of the life estate and entitled to rent the same.

It is next contended by appellants that the Court erred in giving the first and second instructions given on behalf of appellee. Said instructions are as follows:

"No. 1.

The court instructs the jury that if you believe from a preponderance of the evidence that the defendants rented the tract of land in question and that their lease ended by its own limitation, and that the lessor then leased the said tract to the plaintiffs, and that thereafter the plaintiffs gave notice to the defendants to quit possession, then the court instructs you your verdict should be in favor of the plaintiffs, Sam Novian and Wilson Mukeloff."

"No. 2.

The court instructs the jury that if you believe from the greater weight of the evidence that Sawyer rented the lands in controversy to the defendants and that subsequently he rented the said lands to the plaintiffs, such lease to take effect at the termination of the defendants' lease, and that the plaintiffs gave the defendants notice to quit possession after the termination of their tenancy, then you are instructed that the plaintiffs are entitled to maintain this action and are entitled to the possession of the lands."

The Court erred in giving these instructions for the reason that they assume in effect that C. E. Sawyer had the right to rent said premises to appellee on his own behalf.

It is also contended by appellants that this judgment should be reversed for the reason that one of the counsel for appellee in the opening statement said to the jury, "A suit was brought in the Justice of the Peace Court and when the case was tried the case was appealed, and I might say to you gentlemen that we won the case in the Justice Court." And again in the closing argument, he said to the jury: "I know that an Edwardsville jury will not be misled by a Granite City lawyer." The record discloses that the lawyers representing the appellants were from Granite City and that the jury was largely made up of men coming from Edwardsville. Objection was made to these remarks and was sustained by the Court. It has been frequently held that sustaining of objections to remarks of this character do not obviate the injury done. We are of the opinion that the remarks referred to were prejudicial and constituted error. *Chapman v. Chicago City Railway Company*, 172 App. 443; *Pate v. Big Muddy Coal Company*, 158 App. 578, *Springfield Consolidated Railway Company v. Bell*, 134 App. 426; *I. C. Railroad Co. v. Setiz*, Ill. App. 242; *P. B. & Co. Traction Co. v. Vance*, 234 Ill. 36. We are not prepared to say that for the making of these remarks, though erroneous, we would reverse this case, at the same time we want to caution counsel for appellee that on a re-trial of this case they should refrain from making remarks of like character.

It is a well recognized principal of law that the plaintiff, in suits of this character, must rely on the strength of his right to possession in order to maintain his suit. The mere fact that the parties in possession may not be in a position to retain the possession of the same against the persons rightfully entitled thereto, that that does not make the plaintiff's case.

For the reasons above set forth the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

Not to be reported in full.

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

MARCH TERM, A. D. 1922.

HENRY MUNSON,

Appellant.

vs.

CLYDE FLEMING,

Appellee.

2261A 656
Appeal from the
Circuit Court of
Richland County.

Opinion by Boggs, J.

An action in trover was instituted in the Circuit Court of Richland County by appellant against appellee, to recover possession of a tractor, certain farm implements and live stock. The jury was waived and on the trial before the Court a finding was made in favor of appellee and judgment rendered thereon against appellant in bar of action and for costs. To reverse said judgment this appeal is prosecuted.

The record discloses that on the 5th day of January, 1921, one F. S. Bower who had been a resident of Richland County, delivered to appellant his promissory note in the sum of \$382.40 due seven months after date; that on the same date he executed a chattel mortgage securing the same on certain farm implements and live stock. On August 20, 1921, Bower executed a second chattel mortgage to appellant on the same property, which said mortgage recited it was given to secure a note dated August 25, 1921. This mortgage was acknowledged and filed for record in Richland County on August 20, 1921.

Some time in March, prior to the giving of this second mortgage, Bowers removed said mortgaged property from Richland County to Clay County, Illinois. Said last mentioned note and mortgage were sent to appellant by mail, and the record discloses that he received the same. The record further discloses that prior to these transactions Bower had given Munson a mortgage early in 1920 in the same amount and secured by a mortgage on the same property. This mortgage matured August 25, 1920, and was renewed by mortgage and note maturing January 25, 1921. The evidence also discloses that Bower, while a resident of Richland County, gave a mortgage to appellee Fleming to secure a debt of \$300 and after his removal to Clay County he gave another chattel mortgage to appellee for \$1000. These mortgages to appellee were given on machinery and stock and mentioned most of the property covered by appellant's mortgage. The last mentioned mortgage to appellee was dated April 8, 1921, was recorded in Clay County on the same date, and by its terms fell due April 8, 1922. Bower died October 4, 1921 and upon his death appellee, pursuant to the provision of his mortgage, took possession of said mortgage property, advertised the same for sale and the same was sold.



thereunder except certain property claimed by Bower's widow. On October 25, 1921, appellee rendered an account of said sale to the widow who was Administratrix of her husband's estate. Said property did not sell for enough to pay said mortgage indebtedness to appellee. An action in trover was instituted after appellant had learned that appellee had taken possession of and sold said property.

It is first contended by appellant for a reversal of this judgment, that prior to July 1, 1921, Sections 4 and 5 of the Chattel Mortgage Act were amended by the State Legislature the effect of which would be to extend the lien of appellant's mortgage for ninety days after the debt was due. The act in question was not sent to the Governor until July 1, 1921, and was not signed by the Governor, but was retained in his possession over ten days. On the 13th day of July it was filed with the Secretary of State without the Governor's signature or objection. On the same date the Secretary of State certified that the bill had become a law. Counsel for appellant contend that the law became effective July 13, when certified to by the Secretary of State, and was operative to extend the lien of his mortgage for ninety days after August 25, 1921, and that his right to the property was superior to the rights of appellee under his mortgage. On the other hand counsel for appellee contend that while said amendment became a law in July 1921, it did not become effective until July 1, 1922, under the provision of the constitution which provides that no act of the General Assembly shall take effect until the 1st day of July next after its passage, unless there be an emergency clause etc. In our view of this case it will not be necessary for us to pass on this controverted question, as we are of the opinion that the case should be affirmed even though appellant is right in his contention as to the time when said amendment took effect. It was a question for the trial court on the facts and circumstances surrounding the execution of said mortgage dated August 20, 1921, and the note secured thereby, the mailing of the same to appellant, and the retention thereof by him as to whether there had been a renewal of said chattel mortgage as claimed by appellee, and the finding thereon should not be disturbed unless again the manifest weight of the evidence. The determination of controverted questions of fact by a trial court are entitled to the same weight in an appellate court as the verdict of a jury, and will not be disturbed unless manifestly against the weight of the evidence. *Springer vs. Bradley*, 191 Ill. App. 45; *Hess vs. Kellebrew*, 209 Ill. 193.

In *Schroeder vs. Smith*, 249 Ill. p. 574, the Supreme Court, in discussing the question as to whether or not a deed for real estate had been delivered, on page 576 says:

"Appellee was in possession of the deed executed by Mrs. Schroeder. He produced it at the hearing and offered it in evidence. The deed bore a certificate of acknowledgement by a notary public, regular in form, as of the date of execution, and was recorded September 3, 1884. The execution of the deed was sufficiently proved by the certificate of acknowledgement of the notary public. (*Hurd's Stat.* 1909, chap. 30, Sec. 35; *McConnel vs. Johnson*, 2 Scam. 522.) and the recording of the deed is prima facie evidence of delivery. (*Valter v. Blavka*, 195 Ill. 610.)"

The chattel mortgage dated August 20, 1921, was duly



acknowledged August 20, 1921, and was filed for record in Richland County on August 20, 1921, and was with the note secured thereby in possession of appellant at the time of the trial. Appellant presented to the trial court the following proposition of law:

“The Court holds as the law applicable to this case that the chattel mortgage offered in evidence, as Plaintiff’s Exhibit One, vested the legal title to the property therein described, in the Plaintiff, Henry Munson, and that if the Defendant sold and converted said property to his own use at any time prior to the commencement of this suit, then and in that case the Plaintiff is entitled to recover the value thereof, not exceeding the sum of \$104.71.” which the Court marked refused.

In our view of the law, as above stated, the Court did not err in refusing this proposition of law.

Finding on reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

MARCH TERM, A. D. 1922

226 658

W. S. STORMENT,

Appellee.

vs.

E. H. BARENFANGER,

Appellant.

Appeal from the
Circuit Court of
Marion County.

Opinion by BOGGS, J.

An action in assumpsit was instituted by appellee against appellant in the Circuit Court of Marion County, to recover commissions alleged by appellee to be owing to him by appellant for procuring a purchaser for certain premises owned by appellant in Salem, Illinois, known as the Lyric Theatre. The declaration consists of one special count and the consolidated common counts. The special count is founded on a written contract for the sale of said premises hereinafter set forth. To said declaration appellant filed a plea of the general issue and four special pleas. An examination of the first special plea discloses that all of the matters of defense set forth therein could have been offered under the general issue. The second special plea alleges that appellant notified appellee that he had withdrawn said property from sale and that appellee consented to said withdrawal. The third special plea sets forth that appellant gave to appellee oral notice that he had withdrawn said premises "from the market and from sale on the market by the plaintiff" and that appellee accepted said oral notice and thereby waived written notice. The fourth special plea in its practical effect was the same as the third. A trial was had and a verdict was rendered in favor of appellee for \$250.00. A motion made by appellant for a new trial was overruled and judgment was rendered on said verdict against appellant for \$250.00 and costs. To reverse said judgment this appeal is prosecuted.

It is first contended by appellant that the verdict of the jury is against the manifest weight of the evidence. The record discloses that on July 31, 1919, appellant executed and delivered to appellee the following contract of agency for the sale of said premises:

"I, E. H. Barenfanger, of Salem P. O., County of Marion and State of Illinois, have this day given W. S. Storment the exclusive sale or transfer of the following real estate, to-wit: The picture show, all fixtures and building of Section, Township, Range, County of State of Illinois, which is owned by me. I hereby appoint W. S. Storment as my agent and authorize him to enter into a written contract for me in my behalf and in my name, for the sale of real estate. I agree to make a good satisfactory deed, and if required to do so, give a clear abstract

of title to said real estate showing the title to be fully vested in me. In consideration of said agent's services in making such sale, transfer, sending me a buyer or being instrumental in any manner whatever in selling or transferring said property, I agree to pay said W. S. Stormont, out of the first money collected, \$500 commission on the whole amount, and all over the list price of \$15,000 payable at the close of the sale. Should I wish to withdraw the above property from market, or advance price, I agree to give said agent written notice thirty days prior to such withdrawal or advance. I agree to pay said agent \$10.00 for advertising should I withdraw said property from sale six months from date. Any change in the price or terms agreed to by me shall work no forfeiture in commission due said agent in case of sale or transfer of said property."

That thereafter appellant sold said premises to the Benton Amusement Company for about \$17,000, and the question arises on this record as to whether or not appellee before the sale of said premises by appellant, procured a purchaser for said premises who was ready, able and willing to purchase the same on the terms set forth in the contract or terms satisfactory to appellant.

The testimony on the part of appellee is to the effect that some few weeks after the execution of said agency contract, appellee had a conversation with appellant with reference to the sale of said premises, and that appellant suggested to appellee that one Jesse Griffin, a farmer living in that County some ten or twelve miles from Salem, might purchase said premises. Appellant testified he suggested to appellant that he did not know whether Griffin had ability to buy a property of this value, and he further testified that appellant replied: "Mr. Griffin can pay a nice little sum, \$1000 or \$1500 and assume the Marion County Building and Loan, which was \$6000, on said premises, and that he would arrange some notes to take care of the balance, and his picture show business, as it advanced and made money, he would take up these notes." Appellee further testified that he took the matter up with Griffin and that he and Griffin had reached a conclusion about the matter, and that he told appellant the deal was working with Griffin, and that he thought he was going to consummate it. He further testified that some week or ten days thereafter, he saw appellant in the National Bank at Salem, and that appellant said, "Say, about that deal with you and Griffin, let that drag a while, I have another deal on now that looks better to me. * * * * I have another deal on with a party from Benton. I have given them an option for thirty days." and that appellant walked off and left him. Appellee further testified that Griffin came in in about a week or ten days and that he and Griffin met appellant on the street and that he told appellant that Griffin was in to close up the deal; that appellant replied. "You can't do that. I told you the other day I had given another party a thirty day option." He further testified that he called appellant's attention to the fact that he had the exclusive contract for the sale of said premises, and that appellant said, "I can't do anything today. This other party will make us more money, and I can do nothing for thirty days is out." Appellee is corroborated by Griffin who testified to the effect that appellant had been in correspondence with Griffin with reference to the sale of this

property, and Griffin also corroborated appellee as to what was said on the street that day by appellant with regard to the sale of this property. On the other hand appellant denied ever having said to appellee that Griffin could pay down \$1000 or \$1500 and assume a mortgage of \$6000 that was on the premises, and that he, appellant, would take his note for the balance to be paid out of the profits of the business as it would be conducted. Appellant admitted having a conversation with appellee on the street, in which appellee informed him that Griffin was ready to purchase the property, but denied that appellee told him that Griffin would pay \$500 down and assume the mortgage, and then give notes falling due later on for the balance. The evidence, therefore, is sharply conflicting as to whether or not appellant authorized appellee to sell said premises to Griffin for other than a payment in cash at the time the deal was closed. It is contended throughout by counsel for appellant that in order to recover in this case, that appellee must have secured a purchaser ready, able and willing to purchase said premises at a cash price of \$15,000, that not having done so, he cannot recover. On the other hand, counsel for appellee contend that appellant himself suggested Griffin as a purchaser, and that Griffin was ready, able and willing to purchase said premises on the terms that appellant himself had suggested. It may be observed that said contract is not very specific with reference to the terms of the sale. Said contract provides that out of the first money collected on the sale of the said premises, appellee is to take \$500 and that he is to be paid all over the list price of \$15,000, "payable at the close of the sale." Said contract, therefore, evidently contemplated a cash payment at the time the contract of sale should be entered into, and that the residue of said purchase money should be paid at a later date. There being no corroboration in the record, of the testimony of appellant, we are not prepared to say that the verdict of the jury on this conflicting testimony is against the manifest weight of the evidence. If the testimony on the part of appellee is to be believed, appellant made no objection to Griffin as a purchaser on the ground that the terms of sale were not satisfactory. Under the issue in this case, we think this is a matter of some importance.

In *Smith, Executor, v. Keeler*, 151 Ill. the Supreme Court of this state, in discussing a question of this character on page 522, says:

"Smith, when informed that his broker had found a purchaser and made a sale, made no question as to the fact of the sale, or of its terms, but simply declined to carry out the contract, the sole ground of his action being, that in the meantime, he had received a better offer and that he had concluded not to sell at all. * * * * The failure to call in question the assertion that a sale had been made, or to find any fault with the terms of the contract, or even to make any inquiries in relation thereto, furnishes some evidence that his broker had made a sale upon the terms which were within the purview of his authority, and which, if he had not concluded to withdraw the property from the market, would have been perfectly satisfactory to him."

To the same effect is *Weaver v. Snow*, 60 Ill. App. 624; and *Crouse v. Rhodes*, 50 App. 120.

It is next contended by appellant that he made an oral with-

drawal of the sale of said premises from appellee's hands, and that appellee acquiesced therein and waived the giving of the written notice specified in the contract. Without going into a discussion of the evidence on this question it is only necessary for us to say that we are satisfied with the finding of the jury on that issue as we believe the preponderance of the evidence is to the effect that appellee did not consent to such withdrawal, and that he did not waive the thirty days written notice provided by the terms of said contract.

It is next contended by appellant for a reversal of said judgment, that the court erred in giving the first and third instructions on behalf of appellee, on the ground that they directed a verdict, and failed to refer to the defenses set forth in appellant's special plea. We have examined these instructions in the light of the criticism made and find that they do not in so many words direct a verdict, but do indicate under certain circumstances that appellee would be entitled to recover a commission of \$500. We are inclined to hold that the giving of these instructions, taken in connection with the other instructions given, is not reversible error. In *Carter v. C. V. & C. Ry. Co.* 340 Ill. 152, the Court on page 159 says:

"The seventh instruction given on behalf of the appellees, after reciting what the material averments of the declaration were, told the jury that if the appellee had proven said averments by the evidence, and also that appellants failed to construct the drain as required by the contract, within a reasonable time, and that damages thereby resulted to appellee, the verdict should be returned in their favor. The complaint made of this instruction is, that it ignores the defense made by appellant that it was excused from complying with the contract by direction of one of appellees. While the instruction did not negative the defense of waiver, it was based upon the pleadings and appellee's proof and stated their theory of the case. It did not state that the waiver of the performance of the contract should not be considered ***.

We have examined the third instruction in connection with the criticism made against it, and do not believe that the Court erred in giving the same.

It was also contended by appellant that the Court erred in refusing to give the first, second, third and fifth of the instructions offered by appellant and which were refused by the Court. We have examined each of these instructions in the light of the criticisms made, and are of the opinion that so far as these instructions state correct principles of law, they were covered by instructions already given on behalf of appellant. It was suggested by counsel for appellant, in his brief, that if appellee was entitled to recover at all, he was entitled to recover \$500, and that the verdict being only for \$250 was clearly wrong. The law is well settled in this State that the defendant in a law suit cannot complain, because the verdict of the jury against him was not as large as the evidence would warrant. That objection is one that must be made by the plaintiff in order to be available. *Fuller v. Brady*, 22 App. 174-176.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment Affirmed.

Not to be reported in full.



IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

MARCH TERM, A. D. 1922

MC CREERY LUMBER COM-
PANY, Incorporated,

Appellee,

vs.

JAMES T. COLLINS and LETCH-
ER IRONS, Partners, doing
business under the firm name of
Collins and Irons,

Appellants.

226 I. A. 656

Appeal from
Circuit Court
Jefferson County.

Opinion by BOGGS, J.

An action in assumpsit brought in the Circuit Court of Jefferson County to recover for certain material alleged to have been furnished appellants by appellee was tried by the court without a jury and resulted in a judgment in favor of appellee for \$973.76. To reverse said judgment appellants prosecuted this appeal.

The errors assigned on the record are (1) that the finding and judgment of the Circuit Court were and are contrary to the weight and preponderance of the evidence; (2) the finding and judgment aforesaid are not supported by the evidence; (3) the court erred in finding the issues for the plaintiff and in giving judgment for the amount claimed. No propositions of law were submitted by either side to be passed upon by the court.

The only question, therefore, arising on the record is as to whether the finding of the trial court is against the manifest weight of the evidence. *Springer v. Bradley Mfg. Co.* 191 Ill. App. 45; *Hess v. Kellebrew*, 209 Ill. 193.

The record discloses that appellants Collins and Irons were successful bidders at a letting of the contract to build certain sidewalks in Johnston City. One George Henderson, a salesman for the Missouri Portland Cement Co., testified on behalf of appellants that he stated to them at said letting, that his Company would furnish the cement for said sidewalks on the tracks at Thompsonville for the sum of \$2.18 per bbl., but that he further stated to appellants that it would be necessary for them to have a local dealer to handle and store the cement. This witness further testified that he explained to appellants that they must see appellee, McCreery Lumber Co., of Johnston City, and get their bid for handling said cement.

No arrangements were made between appellants and appellee in reference to the handling of said cement. Said cement was shipped by the Cement Company direct to appellee and was charged to it. In the main appellants hauled said cement direct from the cars but in one or two instances the cars were unloaded by appellee and the cement was stored by

it. Appellee charged appellants \$2.80 per bbl. for this cement. This being the price quoted by appellee to all of the bidders, bidding on said work.

Appellee's evidence is to the effect that it received said cement from the Missouri Portland Cement Co. and paid for it direct; and that it furnished said cement to appellants as it would any other customer, charging them therefor at the regular retail price of \$2.80 per bbl. Statements were rendered by appellee to appellants for said materials. When all of the cement had been delivered and final statement rendered for the balance claimed to be owing for said cement at the rate of \$2.80 per bbl. and for certain lumber furnished, appellants then refused payment and for the first time, so far as the record discloses, insisted that they had not purchased said cement from appellee but had purchased it direct from the Missouri Portland Cement Co.

The evidence on this controverted question is conflicting, but after a careful examination of the record we are of the opinion that the trial court was warranted in finding the issues for the appellee and in rendering judgment against appellants for the balance claimed by appellee. At any rate we are not prepared to say that the finding of the trial court is against the manifest weight of the evidence.

There being no express contract between appellee and appellants as to how much appellants should pay for said cement, the law implies that the same shall be paid for at the usual and customary price for such material at the place where the same is delivered. *B. S. Green Co. v. Smith*, 52 Ill. App. 158; *McEwen vs. Morey*, 60 Ill. 32. The record discloses that the amount charged by appellee for said cement was the regular retail price at said place.

It is also contended by appellants that appellee overcharged them for certain lumber purchased by them to be used in and about their contract in putting in said sidewalks. The evidence on the part of appellants being to the effect that appellee was to charge them at the rate of \$35.00 per M. for this lumber and that appellee charged for certain of the lumber \$45.00 per M. The evidence on the part of appellee is to the effect that two classes of lumber were shown appellants. One class being sold at \$35.00 per M. and the other at \$45.00 per M. and that the persons using the materials were not satisfied with the \$35.00 per M. lumber and procured lumber that had been quoted at \$45.00 per M. The evidence was conflicting on this issue also, but we hold that the evidence supports the finding and judgment of the court thereon.

It is further contended by appellants that they were charged with one more car of cement than they had received. The only evidence offered in support of this contention being that of two employees of appellants, who testified from memory in regard thereto. The account books, bills of lading and direct documentary proof offered by appellee clearly sustain the amount it claims to have furnished appellants and included the car of cement in question.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment Affirmed.

Not to be reported in full.



IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

MARCH TERM, A. D. 1922

226 T. A. 656

MARY A. BAKER and H. S. BAKER,
Trustees, etc.

Appellees.

vs.

THE FEDERAL SYSTEM OF
BAKERIES OF AMERICA, a
Corporation, and Joseph J. Eck-
hard and John E. Eckhard, part-
ners, etc.

Appellants.

Appeal from the
Circuit Court of
Madison County.

Opinion by Boggs, J.

An action in forcible entry and detainer was brought by appellees, trustees, under the Will of H. S. Baker, deceased, before a Justice of the Peace, in Madison County, Illinois, against appellant, to recover possession of certain premises located in the City of Alton, Illinois. A finding was made by said Justice in favor of appellees, and judgment was entered thereon. Appellant appealed the case to the Circuit Court where the cause was tried by the Court without a jury, a finding in favor of appellees was made by the Court, and judgment was rendered against appellant for the possession of said premises and for costs. To reverse said judgment, appellant prosecutes this appeal.

The record discloses that on August 1, 1918, appellees executed a lease for the above mentioned property to one Joseph A. Eckhard and John E. Eckhard, partners doing business as Eckhard Brothers. Said lease was to run from July 1, 1919 to and including June 30, 1920, with the privilege of renewing the same for a period of four years, provided notice of said intention was given on or before June 1, 1920. There was a provision in said lease for the sub-letting of said premises. Eckhard Brothers had been in possession of the property in question under a former lease, and shortly after the execution of the lease in question, vacated said premises and moved to another building. Joseph J. Eckhard sought to rent the vacated building to appellant, Federal System of Bakeries, and for that purpose called upon Henry Baker who had active management of the business for said trustees. At first Baker refused, but after several interviews, and after being assured that the insurance rates would not be increased, withdrew his objection and consented to said Bakery Company going into said building. The rent, however, during all the time that appellant Federal System of Bakeries, occupied said building was paid to said trustees according to the terms of said lease by Eckhard Brothers. About the 11th day of June, 1919, a written agreement was entered into between Joseph J. Eckhard and E. E. Brewer for the use of E. E. Brewer, C. L. Butler, I. G. Hipsley and

others, which said agreement is in words and figures following:

This memorandum of agreement, made and entered in this the 11th day of June, A. D. 1919, by and between Joseph J. Eckhard of Alton, Ill., party of the First Part, and E. E. Brewer, of Chicago, Ill., party of the Second Part, Witnesseth:

That the party of the first part hereby agrees to turn over or assign to the party of the second part for the use of E. E. Brewer, C. L. Butler, I. G. Hipsley and others, all of Chicago, Ill., certain lease covering property described in said lease and located at 123 West Third Street, Alton, Ill. (copy of said lease attached hereto), on the following conditions:

1. The party of the first part agrees to give possession to parties of the second part of said property on June 26th, A. D. 1919, on the same terms and conditions as stated in said original lease (excepting that part of the lease referring to the installation of steam heating plant). It is further understood and agreed that the rental to be paid by parties of the second part shall commence and become effective July 1st, 1919.

It is further understood and agreed that the assignment of this lease shall be made on or before October 1st, A. D. 1919, and any payment of rents which may become due under the terms of this lease shall be made on or before October 1st, A. D. 1919, and any payment of rents which may become due under the terms of this lease on or before the transfer of the lease to parties of the second part shall be paid to party of the first part.

It is agreed that party of the first part shall allow party of the second part until June 14th, 1919, to accept or decline the lease, notice of same to be mailed in writing to H. E. Paul, Alton, Ill.

In witness whereof we have hereunto set our hand and seals this the 11th day of June, A. D. 1919."

On May 14, 1920, E. E. Brewer, in a letter addressed to appellee, H. S. Baker, recited that he was assignee of the lease given by appellee to Eckhard Brothers, and that he desired to renew the same for a period of four years as provided in said lease. Appellant, Joseph J. Eckhard testified that on the same day, May 14, 1920, he mailed a notice to Henry Baker to the effect that he had elected to extend the lease on the building in question for a period of four years beginning July 1, 1920. He further testified that he enclosed said notice in an envelope properly addressed to said Henry Baker, and that he mailed the same on said day. Baker admitted having received a notice mailed by E. E. Brewer but denied having received a notice from Eckhard. Soon after the expiration of the original lease, appellees served appellants, Eckhard Brothers and Federal System of Bakeries, with a written demand for the possession of said premises. Appellants refused to surrender possession and the above mentioned suit was instituted.

It is first contended by appellants for a reversal of this judgment, that appellants, Joseph J. Eckhard and John E. Eckhard, were not in possession of these premises at the time demand was made and suit was brought, and that, therefore, no judgment should have been rendered against them for the possession of said premises and for costs.

The evidence in the record is not clear as to whether or not Eckhards were in possession of any part of said premises at the time said suit was instituted.

The record, however, discloses that appellant Joseph J.

Eckhard, when testifying, said, "I refused to deliver up possession of the premises when demand was made." On cross-examination he was asked the following question, in which he made reply: "You say your refusal to surrender possession was not because of the form of notice or anything like that: A. No, Sir." Appellee Henry Baker testified on direct examination with reference to Eckhard's possession as follows: "I don't know whether Eckhard Brothers had any possession of property so far as having anything in the building, I don't think they had, but I do not know." He further testified on direct examination that "possession was not surrendered to myself or my mother as trustees, pursuant to that demand made, they still had possession of the property."

We think, therefore, in view of the evidence in the record, that the conduct of appellant Eckhard Brothers was such as to warrant the Court in rendering judgment against them for possession of said premises and for costs if the record otherwise warranted it.

It is next contended by appellant that the agreement hereinabove set forth amounted to an assignment of the lease given by appellees to Eckhard Brothers and that, therefore, the notice that E. E. Brewer sent to appellee Henry Baker, and which Baker admits having received, under the terms of the original lease had the effect of extending said lease for a term of four years from July 1, 1920. On the other hand, appellee, insist first that said instrument did not amount to an assignment of said lease, and second that if it did, it was not an assignment to appellant Federal System of Bakeries, and third, that even if it be held to be an assignment, to the Federal System of Bakeries, that E. E. Brewer, in giving the notice sent to appellee, Henry Baker, did not purport to represent said Federal System of Bakeries. We are of the opinion and so hold that the instrument above referred to did not amount to an assignment of said lease to the Federal System of Bakeries, but was in the nature of an agreement to assign said lease. The language of said agreement clearly sets forth that that was its intention. There is nothing in the record to disclose that any notice was given by said Federal System of Bakeries to appellant Eckhard Brothers, and that they had elected to extend the term of said lease.

It is further to be observed in this connection that said instrument does not purport to deal with the Federal System of Bakeries, which is shown to be a corporation, so that we are clearly of the opinion that so far as the Federal System of Bakeries is concerned, it did not hold an assignment of said lease, and that even if it did, the notice to said trustee given by E. E. Brewer would not have the effect of extending said lease as to said corporation.

It is next insisted by appellant that if it be held that the notice given by E. E. Brewer did not have the effect of extending said lease, that when the notice which appellant Joseph J. Eckhard testified that he mailed, would have the effect of extending the same. As heretofore stated, Henry Baker, to whom Joseph J. Eckhard testified that he addressed said notice, testified that he did not receive the same. It was, therefore, a controverted question of fact for the Court, sitting without a jury, to pass on. While the law is that a letter properly addressed, stamped and placed in due course of mailing, is prima facie evidence that the same was received, at the same time

this presumption is a rebuttable one. In *Henderson vs. Carbondale Coal Co.*, 140 U. S. 25, the Court said:

"There is no testimony as to whether the letter thus mailed was returned to the sender, and no evidence of the receipt of the letter other than that which flows from the fact of mailing. Undoubtedly, under some circumstances this is evidence of the receipt * * * This is not a conclusive presumption and it does not even create a legal presumption that such letters were actually received; it is evidence tending, if credited by the jury, to show the receipt of such letters."

We would, therefore, not be warranted in reversing this case on the ground that said lease was extended by a notice given by Joseph J. Eckhard, as the Court below evidently held that the proof that said notice was received by said trustee was not sufficient, and we are not disposed to disturb said finding.

It was further contended by appellant that the fact that Henry S. Baker, who occupied a room in said building, paid to appellant Federal System of Bakeries, compensation for heat furnished, that that act on the part of said Baker amounted in effect to an acknowledgement of the assignment of said lease. We do not agree with this proposition, and hold that so far as that transaction is concerned there was nothing in connection with it that would in any way estop appellees from insisting that there was no assignment of said lease.

It is also contended by appellants that there was a verbal assignment of said lease by Eckhard Brothers to the Federal System of Bakeries and that appellant, Federal System of Bakeries, having taken possession thereof, and having made some changes therein with the knowledge and consent of appellees it would have the effect of making said verbal agreement of said lease binding, and would give the right to said Federal System of Bakeries, or someone acting for them, to effect a renewal of said lease, if a notice was given before June 1, 1920. We do not understand the law of this state to support this proposition. In *Griffin vs. Pfeffer Lumber Co.*, 285 Ill. the Court, referring to and quoting from *Chicago Attachment Co. vs. Davis Sewing Machine Co.* 142 Ill. 171, on page 23 says:

"The Statute of Frauds was interposed as a defense. The Court in its opinion stated the question involved in the following language: 'This then brings us to the question, this being an action at law and the Statute of Frauds being pleaded as a defense thereto, do the facts that Scates & Ridgway orally assigned the remainder of their term to appellant, that appellant paid them therefor and took possession of the premises at the time pursuant to such oral assignment, and that appellant thereafter paid appellee the rent for the premises as provided by the lease to be paid during the time it thereafter occupied the premises, which payment was accepted by appellee, constitute a valid assignment of the term and so take the case out of the Statute of Frauds and free it of all influences therefrom?' After referring to previous decisions in this state the court said: 'It is manifest the contract, so far as it was a contract for the sale of real estate, could not have been held to be executed, since no title could have passed, and the writing is here just as indispensable to the passing of the title to the term as the deed was there to the passing of the title to the land.' The Court also said that the doctrine that part performance of an oral contract will take a case out of the Statute

of Frauds, applies only in equity and is unknown in courts of law."

And in *Chicago Attachment Co. v. Davis Sewing Machine Co.*, 142 Ill. at page 181, the Court said:

"An assignment of a term is the transfer of the whole estate of the tenant therein to a third person, and differ from a lease in this: that by the latter the lessor grants an interest less than his own, reserving to himself a reversion, but by an assignment he parts with the whole property. Taylor on Landlord and Tenant (2d Ed.) Sec. 426; *Sexton vs. Chicago Storage Co.*, 129 Ill. 318. And so it is said in *Browne on the Statute of Frauds* (Sec. 41) speaking of the English Statute of Frauds of 29 Charles II; 'If the statute were entirely silent as to assignments they could not in reason be made verbally of such terms as require a writing to create them, for if, as is clear, the statute against creating a parol lease applies to those which are carved out of a term as well as out of the inheritance, it can not be that a termor can assign his whole interest verbally when he could not underlet a part of it without writing.' See to like effect also, *Reed on Statute of Frauds*, Sec. 766."

Under the above authorities there was no verbal assignment of the lease in question to the Federal System of Bakeries.

In connection with the notice given by E. E. Brewer to appellee it should be further observed that the record conclusively shows that E. E. Brewer had severed his connection with the Federal System of Bakeries in February, 1920, some four or five months prior to the giving of said notice. This is a possessory action and unless the Federal System of Bakeries can show a lease therefor, it cannot hold the possession of said premises as against appellees.

It is contended by appellants that the Court erred in refusing certain of the proposition of law tendered by it. We have examined the proposition of law held by the Court, and those refused, and are of the opinion that the holding of the Court on the proposition of law were as favorable to appellants as they were entitled to. In fact the Court held with appellants on practically all of the propositions of law submitted by them, but evidently found against them on the facts. It will not be necessary for us to discuss the refused proposition as what we have already said in this opinion clearly sets forth our views on the law governing the question involved in this case.

Finding no error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

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226 I.A. 657

GEORGE M. GATTS and
GRACE HAYWARD GATTS,

Appellants,

vs.

THE HUBBARD FILM MANUFACTURING
COMPANY, a corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COLE COUNTY.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

Appellants filed their bill of complaint, claiming a breach of contract by appellee and praying for its cancellation and incidental relief. This appeal is from a decree sustaining appellee's objections to the master's report and dismissing the bill for want of equity.

Based mainly upon his construction of the contract the master found that there was a balance of \$4,589.31 due to appellants, and recommended a decree for such sum and the cancellation of the contract.

The main controversy hinges upon the proper construction of the contract, and involves particularly the following enumerated paragraphs of the agreement:

"First. The seller hereby bargains, sells, assigns, transfers and sets over to the buyer the sole and exclusive right, license and privilege to make photographic reproductions and so-called motion picture films of said composition and to exhibit the same by projection on screens or otherwise, and to sell, lease, license and generally deal and traffic in said films and reproductions thereof throughout the following territory only, viz: The entire world.

"The preparation of the scenario and the exhibition and exploitation of the said films shall be under the sole direction of the buyer, and the author's name shall be published with all said films and advertising connected therewith. * * *

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"Third. The buyer hereby agrees to pay to the seller for the rights hereby granted and transferred a sum equal to ten (10) per cent of the entire amount received by the buyer and to which he shall become entitled by virtue or as a result of the sale, rental, license, exhibition or other dealing in and with any and all negatives or films for pictures of said play whether received or receivable directly or indirectly by the said buyer, it being the intention that said percentage shall be calculated and payable upon all receipts, fees, moneys, and income to which the said buyer shall become entitled from any use of the said composition, negative or films however the same may accrue. Said payments shall be made to the seller at the office of Senger & Jordan, 1432 Broadway, in New York City in cash or New York draft, accompanied with certified statements of all such receipts, and shall be made monthly, beginning one month after the first film shall be released.

"Fourth. The buyer agrees to keep full and accurate accounts of all receipts above mentioned, which shall be open to the inspection of the seller or his authorized representative at all reasonable hours."

The essential facts are not in dispute. The picture rights disposed of in the contract were those of appellants to a certain composition entitled "Granstark." Appellee is a corporation, engaged in the business of producing motion pictures, which involves engaging and paying the actors, preparation of scenes, and supply and development of the films of the play. After entering into the contract in question it produced films of Granstark at a cost to it of about \$40,000. When the picture was ready for release appellee entered into a contract for its distribution with a corporation, the V. L. S. & E. Co., referred to as a booking agency, exchange or distributor. Most of the fund for which an accounting is sought came from the contract with said distributor. Later it went out of business and there was distribution through another company under a similar contract presenting practically no different question for consideration.

The V. L. S. & E. Co., was organized for the purpose of distributing picture films. To that end it maintained a principal office in New York City, where it was deemed advantageous to first present so-called feature plays, which

consisted of five or more parts or reels. Graustark was a play of that character. A big company maintained a force of salaried salesmen over the country, through whom it sold or rented the films handled by it to theatrical managers or exhibitors for such price or prices as the salesmen could obtain, varying in different localities. This was a generally known method of distribution. There was, therefore, a series of contracts, one between the owner and producer for the right to produce and use the picture, one between the producer and distributor, who is specially equipped with a force and facilities for dealing with exhibitors over the country and adjoining territory, and one between the distributor and the exhibitor.

The contract between appellee (whom we shall refer to as Essanay or the producer) and V. L. D. & E. Co., (whom we shall refer to as the distributor) for distribution of the picture was in writing. While it could not be found and produced at the hearing to show its precise terms its provisions do not seem to be questioned. As stated by Essanay's president, who executed the same, the contract merely provided for the delivery of films and advertising to the distributor upon an agreement that the latter would undertake distribution of the same and pay Essanay seventy per cent of what it was paid by exhibitors. Pursuant to such contract the distributor leased or sold films to various exhibitors in various cities and made reports from time to time to Essanay of what it received from the exhibitors, and according to the contract remitted seventy per cent of the amounts so paid it by the exhibitors. Essanay in turn remitted to appellants ten per cent of what it received from the distributor, the amount of which is not questioned.

The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, for the year ending June 30, 1901.

The turning point of the whole controversy, therefore, is whether, as contended by appellants, Eassey was to pay them 10 per cent of what the exhibitors paid the distributor, or, as contended by appellee, 10 per cent of what it received from the distributor.

We think the fallacy of appellants' position lies in the contention that the V. L. S. & W. Co., was a mere agent of appellee. It is conceded that there is no ambiguity in the language of the contract. If there were any doubt as to its construction from its context, there can be little question that the general methods in use for exhibiting motion pictures must have been contemplated, the contract indicating nothing to the contrary. Eassey was not a distributor, and had no exchanges or facilities for reaching exhibitors. It was a producer and seller. While the bill is predicated in part upon the theory that appellee was equipped with agencies for marketing and distributing its productions, there was no finding of the master to that effect or evidence to support it. The proof was to the contrary.

But as the contract is not ambiguous no necessity arises for going outside of it to ascertain its meaning. In such a case the rules of construction are too well established to call for discussion. The language employed is broad and comprehensive. Under the first paragraph of the agreement appellee is granted the right both to produce and use the picture and various ways are specified in which appellee may use it, giving it the broadest discretion "to deal or traffic" with the product. Apparently that there might be no misunderstanding, and no restrictions placed upon the rights or methods of disposal granted, the contract, after specifying various methods, gives the comprehensive cover to "generally

deal and traffic" therewith; and by reference to paragraph third it will be noted that appellee did not covenant to resort to any particular method of exploiting the picture. It not being questioned that the contract with the distributor for putting the picture upon the market was within the scope of the rights so transferred to appellee, it is difficult to escape the conclusion that the "receipts" referred to upon which the percentage of 10 per cent is to be computed are only such as appellee actually received and was entitled to by virtue of such contract. It is the expressly declared intention of the contract that "said percentage shall be calculated and payable upon all receipts * * * and income to which the said buyer shall become entitled from any use of the said composition," etc. Under its contract with the distributor, Kesney was only entitled to, and only actually received, 70 per cent of what the distributor obtained from its various contracts with the exhibitors, and appellants have been paid the full 10 per cent of the amount so received. Unifcately, under the terms of the contract Kesney was not restricted to any particular method of exploiting the picture. It undoubtedly could have sold the same outright, or rented it or leased it, for a specific sum or upon a royalty basis; and the additional right transferred to "generally deal or traffic" with it certainly did not preclude a similar arrangement with the distributing agency. The contract with the latter was practically one of sale. Under it the latter had and exercised the right to contract with exhibitors in its own name, for its own use, upon its own terms and at its own expense. The fact that the compensation it was to pay to Kesney was upon a percentage basis did not change the character of the contract nor make the distributor a mere agent of appellee. There was no contractual relation between Kesney and the exhibitors. Their contracts were with the distributor who obtained from Kesney the right to deal with exhibitors for

the privilege of exhibiting the picture. Whether what was paid the distributor be called purchase price or rental, it was the property of the distributor and not of Essanay. The latter could claim as the money "to which it was entitled" only what its contract called for, namely, 70 per cent of what the distributor received through such sales or rentals. The breadth of power given to Essanay under the contract in question, and the nature of its contract with the distributor are inconsistent with appellants' claim that the distributor was a mere agent of Essanay, and that the latter could be called upon to account for anything in excess of its actual receipts under its contracts with distributors. If the contract in question contemplated differently there was no difficulty in employing language to express such an intention. On the other hand, it expressly declares the intention that "such percentage shall be calculated and payable upon all receipts * * * to which said buyer shall become entitled from any use of the said composition * * * ." We think this meant the actual receipts obtained by it under any contract it saw fit to make with reference to the composition.

A like conclusion is reached under a similar contract in Arden v. Lubin, 173 N. Y. Appellate Rep., p. 788. That was also a contract for the production of motion pictures founded on plays written by the plaintiff in that case. By its terms defendant agreed to pay him "a sum of money equal to 30 per cent of the gross sales or rentals * * * derived by said Sigmund Lubin from the exploitation and distribution of the said motion pictures." Plaintiff contended that the 30 per cent was to be figured on payments made by the exhibitors of the plays, and defendants, that it was to be computed on the amounts received by them. The court held that the amount actually received by defendants was the amount on which the 30 per cent was to be computed. The language

in that contract was not as explicit or strong as the language employed in the contract in question.

In the case at bar the master found that no additional evidence on which to base an accounting could be obtained. The evidence showed that appellee paid 10 per cent upon all "receipts" from the use of the composition which it actually received.

Whether, therefore, we confine ourselves to the context of the contract in question, or resort to the surrounding circumstances with reference to which it was unquestionably made, we think the construction contended for by appellee, and recognized by the decree, is correct. Reaching this conclusion we need not take up the discussion of appellants' alleged acquiescence in said construction.

One of the items involved in the accounting is that of so-called advertising which was prepared by Issanay at its own expense, in various forms, including lithographs, for use by the exhibitors. This advertising was furnished to the distributor, who in turn sold some of it and gave away the rest to exhibitors. The distributor accounted to appellee for 70 per cent of what it received from such sales. Appellants contend that appellee should also account to them for such amount. Appellee contends that this is no part of the income to which it becomes entitled from the "use of the composition, negative or films" for which it must account under the contract. We think the "receipts", "fees", "moneys" and "income" referred to in the contract are, as there stated, only such as the buyer shall become entitled to "from any use of the said composition," etc. The advertising was one of the expenses incurred in the exploitation of the picture. That was received therefrom was from the sale of advertising and not from the use of the composition. Its purpose was to bring larger receipts to the exhibitors, and to induce them to enter

in this respect we are in complete agreement with the findings
reported in the literature.

In the case of the two groups which were not assigned
to the study we have no comparable data to report. The
findings show that the two groups in the study were not
different from the two groups which were not assigned.

Further, therefore, we have no evidence in the study
of the results in question. It seems to me that the findings
reported with reference to the two groups are not
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into contract with the distributor.

Because appellee did not report monthly to appellants' agents, as provided for in the contract, it is contended that appellants were entitled to a cancellation of the contract. While the reports and remittances accompanying them were made for periods covering usually more than one month's time, sometimes several months, we think appellants' acquiescence therein deprives them^{of} any right to such relief, especially as there is nothing due appellants under the contract. In the case of Long & Somerses Co. v. Gray, 234 Ill. 26, complainants sought the forfeiture of a license to manufacture and sell under a patent for a failure to make sworn reports quarterly, in accordance with the terms of the contract. The contract gave the right to forfeit same upon thirty days' notice. When the notice was given there was nothing due or to report under the contract. The decision was against the right to forfeit for the failure to make sworn reports, as required, the court referring to the familiar principle that the law does not favor forfeiture, and saying that "a clear case, appealing to the principles of justice, must therefore be made out before a court of equity will enforce a forfeiture." The facts on which the rescission of the contract was there asked are not dissimilar from those in the case at bar. There is no doubt that the parties by mutual course of conduct could and did treat such cause of forfeiture as waived. (King v. Hedden, 176 Ill. 72, 77; Watson v. White, 152 Ill. 364.)

It is unnecessary to discuss further fundamental rules relating to the construction of contracts or equitable principles upon which a rescission for the breach thereof will be granted. We think the contract is unambiguous and was

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improperly construed by the master, and that appellants waived the only grounds they had for a decision thereof.

Nor do we think the fact that the president of Seabury controlled most if not all of its stock, and also held stock in the V. L. S. & N. Co., in anywise affects the merits of the controversy here, or that the contract of Seabury, which had no stock interest in V. L. S. & N. Co., was a mere device to evade its full obligations under the contract in question. Accordingly the decree dismissing the bill for want of equity should be affirmed.

AFFIRMED.

Merrill and Gridley, JJ., concur.

The following is a list of the names of the persons who
 have been appointed to the various offices of the
 Board of Directors of the City of New York, for the
 year 1898. The names are given in alphabetical order.
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 Board of Directors of the City of New York, for the
 year 1898. The names are given in alphabetical order.

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PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

MARION ALEXANDER,

Plaintiff in Error.

226 I.A. 657

ERROR TO

CRIMINAL COURT.

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was indicted, and on a trial before the court without a jury, which was waived, convicted of an assault with a deadly weapon with intent to inflict upon the person of another a bodily injury. Both the charge and the finding were in the language of the statute creating the offense. The main contention of plaintiff in error is that the court's finding omitted certain ingredients of the crime. The record does not support this contention.

The other points urged are based upon the bill of exceptions which, upon motion of the People, has been stricken since plaintiff in error's briefs were filed. They are, therefore, not open for consideration. No error appearing on the record the judgment will be affirmed.

AFFIRMED.

Morrill and Gridley, JJ., concur.

GEORGE EHRAU, Doing Business
as GEORGE EHRAU & COMPANY,
Appellee,

vs.

INTERNATIONAL MERCANTILE MARINE
COMPANY, a Corporation, et al.,
On Appeal of INTERNATIONAL
MERCANTILE MARINE COMPANY,
Appellant.

226 I.A. 657

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of the Municipal court of Chicago for \$7,260.80 and costs in favor of appellee, plaintiff to the suit. The action as stated in the amended statement of claim is for a breach of contract, evidenced by three bills of lading, for carriage of Requesfort cheese from Bordeaux, France, to New York City. On plaintiff's motion the court struck certain portions of defendant's affidavit of merits, and submitted the case to the jury on the issues raised by the unstricken part. Defendant took exceptions to the action of the court in so doing, offered no evidence in its own behalf and moved for a directed verdict. The errors assigned and argued relate to rulings on pleadings, to the refusal to direct a verdict for defendant, and to the instructions. No questions of fact are raised.

The statement of claim, as amended, practically sets forth a separate cause of action upon each bill of lading. There is no substantial difference between them as to the points involved in this appeal. It is alleged that defendant is engaged in the business of a common carrier of freight from France and England to the United States; that it owned, operated and controlled lines of steamers known as the White Star Line and

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American Line; that the shipments in question were in vessels of said lines; that R. Vandereruyce and General Steam Navigation Co., Ltd., were its duly authorized agents at Bordeaux, France, to accept for defendant shipments to be by it transported to the United States and other points, and that said agents accepted the shipments in question; that plaintiff was the owner of the cheese, which was delivered in good condition to said Navigation Company at Bordeaux; that said agent issued a written bill of lading covering the shipment consigned to plaintiff's custom house brokers and agents, which is set out in Exhibit A, and that said bill of lading was a written contract on behalf of defendant to safely transport said cheese from Bordeaux to New York; that the cheese was delivered in a damaged condition, due to negligence of defendant in failing to take care of the same during transit, to properly stow the same, and to furnish proper facilities for its care; that it was delivered in a spoiled and unmerchantable condition, and unsalable except at a total loss unless repacked and reconditioned; and then sets up plaintiff's attempt to minimize the damage.

Defendant's final affidavit of merits contains four paragraphs. These numbered 1, 2 and 4 were stricken as aforesaid, leaving paragraph 3, on which the issues of fact went to the jury. The first paragraph set forth the relationship between defendant and its alleged agents to the effect that said Navigation Co. owned and operated a fleet of ships between Bordeaux and Southampton, and that defendant operated a fleet of ships from the latter point to New York through the names "White Star Line" and "American Line;" that defendant did not own or operate any ships between Bordeaux and Southampton; that said Navigation Co. and said Vandereruyce have authority to sign

bills of lading for defendant's lines, which terminate at Southampton; that if either said Navigation Co. or Vanderzuyde secured business for either of said lines at Bordeaux, it or he receives a percent of the through freight charged for so doing; and if any particular shipment is transported on the boats of said Navigation Co. from Bordeaux to Southampton, then the latter Company receives a percent of the through freight for its service in transporting to Southampton and defendant the remainder of the through freight charged; that the shipments in question were transported from Bordeaux to Southampton on the boats of the General Steam Navigation Co.; whereupon defendant contends that under the terms of the bills of lading relied on and such state of facts and circumstances it has not contracted to transport the said freight from Bordeaux to Southampton and owes no duty as plaintiff for transportation between those points, but accepts the bills of lading as its contract from Southampton to New York.

Paragraph 2 of the affidavit of merits avers that plaintiff's damages, if any, resulted from certain enumerated causes which the contract provides shall relieve the carrier from liability, and that under the contract the carrier is not liable for any claim, notice of which was not given before the removal of the goods, and that plaintiff did not give such notice and did not comply with the contract in other respects that need not be referred to.

Paragraph 3 pleaded that defendant had complied with its contract and denied the negligence charged. Paragraph 4 pleaded the statute of limitations.

Appellee seeks to justify the court's action in striking paragraphs 1, 2 and 4 on the ground that the pleading did not comply with certain rules of the Municipal court, particularly rule 13, which provides that every allegation of

Bill of lading for defendant's line, which furnished no
proof that it shipped said defendant's goods to defendant's
agent, defendant's agent for said line at defendant's
office a part of the amount of the bill of lading
and it was particularly pointed out that defendant's
said Navigation Co. from defendant to defendant, then the latter
defendant received a part of the amount of the bill of lading
in defendant to defendant and defendant the remainder of
the amount of the bill of lading (then the amount of the bill of lading
shipped from defendant to defendant on the basis of the
bill of lading from defendant to defendant, which was
under the terms of the bill of lading which on each side of
the bill of lading it has not contained to transport the
said freight from defendant to defendant and was no bill of
lading for transportation between the parties, but merely
the bill of lading on the contract from defendant to New York.
Paragraph 3 of the affidavit of plaintiff says that
plaintiff's charges, it says, resulted from certain statements
made when the parties were made to receive the goods
from plaintiff, and that under the contract the carrier is not
liable for any claims, notice of which was not given before the
removal of the goods, and that plaintiff did not give such
notice and did not comply with the contract in other respects
that need not be recited here.

Paragraph 4 states that defendant had supplied
with its contract and goods the bill of lading, defendant
placed the nature of limitations.

Appellee seeks to justify the carrier's action in
refusing to pay the bill of lading, 1, 2 and 3 on the ground that the plaintiff
did not comply with certain rules of the bill of lading, but

fact shall be taken to be admitted (with exceptions not pertinent here) "if not denied specifically or by necessary implication," and rule 20, which provides that "each party must deal specifically with each allegation of fact of which he does not admit the truth." Under these rules he contends that as the special allegations of the statement of claim above referred to are not specifically denied they stand admitted without the introduction of any evidence. But such of said allegations as are not denied by necessary implication may be admitted without impairing the effect of defendant's defense which admitted the contract was binding on it so far as its own lines were concerned, but denied that it was one on behalf of defendant for transportation from Bordeaux, and pleaded facts showing the limited authority of its Bordeaux agents. Such defense is not inconsistent with its admission of plaintiff's ownership of the goods, defendant's ownership and operation of the White Star and American Lines, the authority of said agents to accept shipments through said lines and to issue a bill of lading covering the same, and that the cheese was delivered in a damaged condition and was unmerchantable, etc. For the facts pleaded in par. 1 of the affidavit of merits by necessary implication denied that it was engaged in the business of common carrier of freight from France, and that a written contract for transportation from that point was its contract, though expressly admitting its obligations under the bills of lading for transportation through its lines from Southampton. But defendant goes further in its plea. In par. 3 it pleads compliance with its contract, which had reference to the one pleaded by it, and denies the negligence charged, and in par. 2 pleads exceptions which under the terms of the contract relieve it from liability. In other words, the matters admitted are not inconsistent with the matters pleaded as a defense and, therefore,

That shall be taken to be admitted (with exception and reservation)
"It is not denied necessarily to be necessary implication."
and also so, which provides that "some party must have been
only with such implication of fact as which he does not share the
view." Other than that he himself has in the present case
portion of the statement of fact which appears to me not
necessarily implied that some other person had been
of any person. The fact of such implication as has not been
by necessary implication may be admitted without implying the
existence of defendant's defense which implied the statement was
further as it is in the fact was necessary, but which
fact is not in fact of defendant. The implication from
statement, and which facts showing the limited nature of the
statement appears. This follows as not inconsistent with the
evidence of defendant's knowledge of the facts, defendant's power
and his position as the wife and mother of the
defendant to call upon to call defendant through with him
and to have a bill of lading showing the fact, and that the
evidence of defendant as a matter of fact is not inconsistent
with the facts stated in part 1 of the statement of
facts by necessary implication denied that it was wrong in the
business of common carrier at that time, and that a
written contract for transportation from that time the fact
evidence, which necessarily implies the defendant's view
fact of taking for transportation through the line from Seattle
region, but defendant's fact is the fact. In part 2 it
states defendant with its contract, which had reference to the
and which by it, and which the defendant changed, and in part
I state questions which were the basis of the present action
to the fact, in part 3, the facts which are not
consistent with the facts stated in a former part, defendant

it was error to deprive defendant of its right to make the defenses so set up. In striking such paragraphs or pleas we think the court put too rigid and narrow a construction upon its rules and their recognition of denial by necessary implication. Under the rules defendant was required to set forth the nature of its defense, whether by way of denial or by way of confession and avoidance, in such a manner as to reasonably inform plaintiff of the nature of the defense that will be interposed at the trial. We think the affidavit of merits was in compliance with this rule, and that the matters that may be held to be admitted under the rules were not inconsistent with the matters either expressly or impliedly denied.

Nor are the defenses so sought to be pleaded inconsistent with the bills of lading set forth in the statement of claim. The bills were signed and purported to be issued by the General Steam Navigation Co. Two of them expressly provide that the responsibility of each carrier is limited to its own line. While the other recites, "We, General Steam Navigation Co. Ltd., agents for the American Line, Southampton," etc., yet such recitation is a mere declaration of the agent, which, upon well known principles, is not proof as against defendant of either the character or the extent of the agency.

The statute of limitations was pleaded upon the theory that it was a good plea if plaintiff relied upon defendant's common law liability and not expressly upon the written instrument. As the statement of claim seems to count upon the written instruments alone, and the statute had not run against a right of action thereon, this paragraph of the plea was, in our opinion, properly stricken. But should the case be heard upon a different theory the court should permit a re-filing of such defense.

it was error to deprive defendant of the right to make the defense of not us. In stating such paragraph as above we think the court put too tight and narrow a construction upon the rules and their intention as laid by various legislatures. The rules defendant was required to see that the nature of the defense, whether by way of denial or by way of confession and avoidance, in such a manner as to reasonably bring plaintiff to the notice of the defense that will be introduced at the trial. To think the plaintiff of notice was in compliance with this rule, and that the defense that may be said to be admitted under the rules were not inconsistent with the nature of the defense or expressly or impliedly denied.

Now are the defenses so sought to be pleaded inconsistent with the bill of lading set forth in the statement of plaintiff? The bill was signed and purposed to be taken by the General Steam Navigation Co. Two of them expressly provided that the responsibility of each carrier is limited to its own line.

While the other carrier, "The General Steam Navigation Co. Ltd., Limited," is the "sole and exclusive" carrier, it is well established is a mere declaration of the agent, which, upon well known principles, is not good as against defendant or either the charterer or the agent of the agency.

The clause of limitation was pleaded upon the theory that it was a good plea if plaintiff relied upon defendant's common law liability and not expressly upon the written instrument. As the statement of claim seems to count upon the written instrument alone, and the defense had not been against a right of action thereon, this paragraph of the plea was, in our opinion, properly rejected. But should the case be heard upon a different theory, the court would surely be willing to

But we think it was error to strike the other paragraphs for the reasons stated. The motion to strike performed the function of a demurrer and the action of the trial court thereon is preserved for review without any other motions. (Harmen v. Callahan, 286 Ill. 50). The motion in arrest of judgment was not necessary therefor.

In view of the error of the court with respect to rulings upon the pleadings whereby defendant was precluded from making its defense, it is unnecessary to consider instructions predicated upon a different theory of the issues, or defendant's motion for an instructed verdict which merely raised a question of law as to whether there was any evidence tending to establish plaintiff's claim. As the case was not, and should be, submitted upon proper issues, we think there should be a new trial regardless of the merits of such motion, and no good purpose would be subserved in discussing the import of the evidence on the issues on which the case was improperly presented to the jury.

Accordingly the judgment of the court will be reversed and the cause remanded.

REVERSED AND REMANDED.

Morrill and Gridley, JJ., concur.

47 - 27510

JAMES KARLAUSKAS, Appellee.

vs.

FORT DEARBORN CASUALTY
UNDERWRITERS,
Appellant.

226 I.A. 657

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit brought upon an insurance policy, issued by appellant to appellee in November, 1930, covering a 1914 model secondhand Reo touring car, whereby appellant agreed to indemnify appellee against damage to the car by fire to the extent of \$400. The car was destroyed by fire two months later. The case was tried without a jury, and the only issue was the value of the car at the time of the loss, which the court found to be \$300. From a judgment therefor this appeal is taken.

After purchasing the car in April, 1930, appellee, who is an automobile mechanic, overhauled its engine, bearings and piston rings, and equipped it with five new tires costing \$40 each. There was testimony to the effect that it was in good mechanical condition at the time of the loss. Appellee and another automobile mechanic, whose testimony did not disclose personal knowledge of market values, testified that its value at that time was between \$600 and \$800.

Appellant's two witnesses, who claimed to be familiar with the market value of secondhand cars of that model, testified that such value was from \$50 to \$125. As the testimony of appellee's witness does not disclose familiarity with the market values of such cars appellant urges that it is not

but as there is no more to be said on this subject, I shall now turn to the second part of the subject.

The first part of the subject is the history of the subject.

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The eighteenth part of the subject is the history of the subject.

The nineteenth part of the subject is the history of the subject.

JAMES RAKLAUSKAS, Appellee,

vs.

FORT DEARBORN CASUALTY
UNDERWRITERS, Appellant.

226 I.A. 657

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit brought upon an insurance policy, issued by appellant to appellee in November, 1930, covering a 1914 model secondhand Max touring car, whereby appellant agreed to indemnify appellee against damage to the car by fire to the extent of \$400. The car was destroyed by fire two months later. The case was tried without a jury, and the only issue was the value of the car at the time of the loss, which the court found to be \$300. From a judgment therefor this appeal is taken.

After purchasing the car in April, 1930, appellee, who is an automobile mechanic, overhauled its engine, bearings and piston rings, and equipped it with five new tires costing \$40 each. There was testimony to the effect that it was in good mechanical condition at the time of the loss. Appellee and another automobile mechanic, whose testimony did not disclose personal knowledge of market values, testified that its value at that time was between \$600 and \$800.

Appellant's two witnesses, who claimed to be familiar with the market value of secondhand cars of that model, testified that such value was from \$50 to \$125. As the testimony of appellee's witness does not disclose familiarity with the market values of such cars appellant urges that it is not

2221.A. 628

EXHIBIT A
PROPERTY OF
THE UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT



UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

This is a map showing the location of the property described in the accompanying plat. The property is located in the northeast corner of Section 10, Township 10 North, Range 10 East, and Section 10 East. The property is bounded by the north line of Section 10, the east line of Section 10, and the south line of Section 10. The property is shown in red ink on the map. The map is a copy of the original map filed in the office of the Register of Deeds for the County of [County Name], State of [State Name].

The property is shown in red ink on the map. The map is a copy of the original map filed in the office of the Register of Deeds for the County of [County Name], State of [State Name]. The property is located in the northeast corner of Section 10, Township 10 North, Range 10 East, and Section 10 East. The property is bounded by the north line of Section 10, the east line of Section 10, and the south line of Section 10. The property is shown in red ink on the map. The map is a copy of the original map filed in the office of the Register of Deeds for the County of [County Name], State of [State Name].

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entitled to the same weight as the testimony of its witnesses on that subject. Defendant's witnesses did not pretend to have any personal knowledge of the particular car in question but testified as to secondhand cars generally of that model and age and do not seem to have taken into account the expenditures placed upon the car by appellant within only a few months before its loss which restored it to a good mechanical condition. Taking into consideration, therefore, the value of \$125 for cars of that type and age generally, as fixed by appellant's own witnesses, together with the cost of such restoration and of the equipment with new tires, we think the court had before it sufficient evidence to fix \$300 as the value of the car at the time of the loss, regardless of the testimony of appellee's witnesses as to value.

Certain remarks of the court indicating untenable grounds for its decision, which appellant urges is ground for reversal, need not be considered for they have no bearing on the sole question before us, namely, the sufficiency of the evidence to support the judgment. It being sufficient, in our opinion, the judgment will be affirmed.

AFFIRMED.

Merrill and Gridley, JJ., concur.

70 - 27542

ANNA KNEIS,
Plaintiff in Error.

vs.

CARL KNEIS,
Defendant in Error.

226 111 007

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This writ of error is sued out to reverse a decree dismissing for want of equity a bill of divorce charging acts of cruelty.

The parties were married in 1896 and lived in Chicago for the last twelve years preceding December, 1920, when they separated. The acts of cruelty testified to consisted of defendant's knocking his wife down with his fists on three different occasions, once in 1916, two months before their last child was born, again in June, 1920, and again on December 3, 1920, while she was sick in bed, rendering her unconscious. There was corroborative proof of each of these unjustifiable assaults, and one of their daughters testified that she was home many times when her father struck her mother and threatened to kill her, but could not remember the dates. There was much testimony to the effect that he was quarrelsome and abusive to her and it was undenied that he chased her out into the snow shortly before the birth of the last child. True, he denied many of the charges of cruelty and sought in turn to show that his wife was quarrelsome. But we think the great preponderance of evidence lies with plaintiff in error and shows such extreme and repeated cruelty as entitled her to a decree of divorce.

It is stated in the brief of defendant in error that the bill was dismissed on the ground of condonation. The record shows none after the last assault, and condonation is conditioned that the ground of offense will not be repeated, and is dependent upon future good usage and conjugal kindness. (Farnham v. Farnham, 73 Ill. 497.)

Two of the four children by the marriage are minors, now about eleven and six years old respectively, at an age when we think it would be proper for them to be left in the custody of the mother, as prayed for in the bill.

The amended bill alleges that the parties hereto are owners in joint tenancy of certain real estate valued at \$6,600 and prays that defendant in error be enjoined from encumbering, charging, selling or otherwise disposing of such real estate, or the household furniture which the bill charges he threatens to sell and dispose of. We find no evidence to support the charge that he threatened to dispose of the household furniture. The bill does not ask specifically for any other relief respecting the real estate held in joint tenancy. Nor is the proof sufficient to justify any other relief with respect thereto than the injunction prayed for. This, we think, should have been granted subject to the court's retaining jurisdiction to change the order as may seem advisable in the future.

It is urged by defendant in error that it does not appear from the certificate of the trial judge to the certificate of evidence that it contains all the evidence, and we are cited to the case of First National Bank v. Baker, 161 Ill. 281, where the court said, that in order to show that the evidence is such as to entitle the complainant to relief the whole of it must be preserved, otherwise it would be presumed there was evidence which justified the finding. In that case it appeared that

It is stated in the report of the committee on the subject of the bill that the bill was introduced in the House of Representatives on the 10th of January, 1907, and was referred to the Committee on Education and Labor. The bill was reported by the committee on the 15th of February, 1907, and was passed by the House on the 20th of February, 1907. The bill was then sent to the Senate, where it was introduced on the 27th of February, 1907, and was referred to the Committee on Education and Labor. The committee reported the bill on the 1st of March, 1907, and it was passed by the Senate on the 14th of March, 1907.

THE BILL

The bill is entitled "An Act to amend the Act approved July 1, 1902, relating to the National Bureau of Education, and for other purposes." It contains 11 sections. The first section amends the Act of July 1, 1902, by adding to the list of the members of the National Bureau of Education the name of the Secretary of the Department of the Interior. The second section provides that the National Bureau of Education shall be organized and shall hold its first meeting on the 1st day of July, 1907.

The third section provides that the National Bureau of Education shall be organized and shall hold its first meeting on the 1st day of July, 1907. The fourth section provides that the National Bureau of Education shall be organized and shall hold its first meeting on the 1st day of July, 1907. The fifth section provides that the National Bureau of Education shall be organized and shall hold its first meeting on the 1st day of July, 1907. The sixth section provides that the National Bureau of Education shall be organized and shall hold its first meeting on the 1st day of July, 1907.

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The nineteenth section provides that the National Bureau of Education shall be organized and shall hold its first meeting on the 1st day of July, 1907. The twentieth section provides that the National Bureau of Education shall be organized and shall hold its first meeting on the 1st day of July, 1907. The twenty-first section provides that the National Bureau of Education shall be organized and shall hold its first meeting on the 1st day of July, 1907. The twenty-second section provides that the National Bureau of Education shall be organized and shall hold its first meeting on the 1st day of July, 1907.

there was other evidence introduced and considered by the court and the court said: "There is nothing in the record which will aid the judge's certificate," which failed to recite that the certificate of evidence contained all the evidence. But in the case at bar we think it is apparent that the entire evidence heard by the court appears in the certificate of evidence. It states as to each witness that he testified "as follows," and then follows an apparently full and exact stenographic report of the proceedings, including each question and answer and the remarks of the court and counsel, and the report bears the "O.K." of defendant's counsel. It shows, too, that at the close of testimony offered for defendant in error his counsel remarked: "That is all of our case; that is all we have." We think, therefore, the record indicates that it contains all the evidence that was heard.

As counsel stipulated, without reservation, that the original bill of exceptions, so-called and so signed, might be incorporated in the record in lieu of a copy thereof, and as such stipulation contemplated a review of the case on the original certificate as certified to, and as counsel approved of the same and made no claim to the contrary we think he is hardly in a position to urge that it does not contain all the evidence on which the decree was based.

Accordingly the decree will be reversed with directions that a decree be entered granting a divorce on the ground of extreme and repeated cruelty, that custody of the minor children be awarded to the wife, subject to the father's right to visit them, that the wife be granted such alimony as further evidence on the subject may disclose is reasonable, and that defendant be enjoined from encumbering, charging, selling or otherwise disposing of the

real estate held in joint tenancy, until further order of the court.

REVERSED AND REMANDED WITH DIRECTIONS.

Merrill and Gridley, JJ., concur.

They were with the first group, and they were with the first group.

They were with the first group.

They were with the first group, and they were with the first group.

They were with the first group, and they were with the first group.

JOSEPH PESICKI, Appellee,

vs.

JOSEPH LEWANDOWSKI, Appellant.

2261A 358
APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

appellee brought this suit against appellant to recover damages to his automobile resulting from its collision with appellant's, and recovered a judgment for \$153 entered upon the verdict.

Each claims the other was negligent. Appellant also urges that the proof was insufficient to show that the cost of repairs, for which recovery was had, was necessitated by the collision, or that the time taken therefor was reasonably necessary, and that the judgment is in excess of the amount proven, and that plaintiff's counsel made prejudicial remarks.

The collision took place in Chicago during July, at the intersection of 47th street and Ashland avenue. Street cars run on both streets. The former runs east and west, and the latter, north and south.

Defendant was his only witness. Plaintiff's sworn version of the facts was supported by an apparently disinterested witness, who stood at the time of the accident at the northwest corner of the intersection from which he had a good opportunity to see, and did see, the accident, as well as both parties, just before and at the time of collision. The jury may well have accepted his version of the affair as to the question of negligence.

• 878

some) or to other bodies (the old, heavy stones).

There are no other persons who have been or will be engaged in the same work.

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As gathered from the entire testimony the facts would seem to be about as follows:

Plaintiff's auto was following an eastbound street car on 47th street which stopped on reaching the intersection. His car stopped behind it. Both started up again, plaintiff's car still behind the street car, going approximately at 9 miles an hour. Defendant's car came from the north about between the two street car tracks on Ashland avenue at a speed of approximately 15 to 20 miles an hour, apparently, as the evidence indicates, with the intention of passing between plaintiff's car and the street car. The latter had only just passed across the Ashland avenue car tracks and was only a few feet, estimated from 11 to 25, ahead of plaintiff's car which was being driven on the southerly side of the crossing. The collision took place near the center of the intersection, defendant's car striking the left forward wheel and front of plaintiff's car. Plaintiff put the brakes on his car but defendant did not appear to slacken his speed.

Such a situation discloses that plaintiff had the right of way, both under the statute and the rules of the road, (Sec. 33 Motor Vehicle Act, Ch. 95a, Cahill's State. 1923/ and that the accident would not have occurred but for defendant's unquestionable disregard of that fact and his negligent driving. No other details of the accident need be alluded to to demonstrate that conclusion. Such as they are they favor plaintiff's version of the affair and are consistent with his lack of contributory negligence either in the speed he was driving or the control of his car.

We have heretofore granted a motion by appellant to expunge from the record the words, "as a result of this accident" from the sentence, "What damage was there to your car, what was broke? As a result of this accident?" on page 30 of the

the defendant from the entire testimony the facts were

that he was not a witness.

Witnesses' names and testimony are contained in the

and on 4/11/11 report which appears on reaching the information.

His own account being that he had stayed at again, defendant's

and still being the same day, being approximately at 10 miles

no more. Defendant's own name from the month ahead between the

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statement. The latter had only just passed through the witness

account was made and was only a few days, according to him it is

32, third of defendant's own which was being given in the

main body of the evidence. The witness had given more

the number of the information, defendant's own giving the fact

that he was not a witness to defendant's own. Defendant's own

fact.

and a witness states that defendant had the right

of way, not under the system and the value of the road, (see 23

Rupp v. Keebler, 175 Ill. App. 619)

under the law, the defendant's own, (see 23)

defendant would not have known that the defendant's negligence

of the defendant was the cause of the accident, (see 23)

and on 4/11/11 report which appears on reaching the information

the defendant with his lack of contributory negligence of the

in the report he was giving on the account of his own.

the defendant's account of the fact he was giving in

the report, "the defendant's own, (see 23)

defendant is a witness to the defendant's own, (see 23)

transcript of the record; and to change the last answer on page 56 from "yes, sir" to "no, sir". But neither of these changes, in our opinion, affects the merits of the case. This motion was made with reference to the contention that the damage to the car testified to was not shown to have been caused by the accident. We think it is perfectly clear, without a specific denial that the condition of the car was such as to require such repairs before the accident, that the injuries testified to were the direct result of the accident. It is an unreasonable inference that plaintiff and his witness, who were asked with reference to the damage of the car as it appeared right after the accident, and answered what were very probable consequences of such a collision, were testifying to any other damage than that which resulted from the accident. There was no contention to the contrary, nor that the number of hours taken to make the repairs were unreasonable. Not only is it an obvious inference from the character of the testimony on the subject, but a presumption, in the absence in the record of a different contention, that the only damage referred to was that occasioned by the accident. (City of Galenburgh v. Higley, 61 Ill. 287.)

The alleged prejudicial remarks consisted of a question which referred to a conversation between defendant and plaintiff's witness in which allusion was made to the Chicago Motor Club. The point made is that the jury might have understood that said Motor Club was by way of insurance responsible for the damages assessed in the case. Regardless of whether or not the question was justified on the ground that plaintiff had the right to bring out the entire conversation of which appellant had previously brought out a part, we do not think the jury could reasonably draw such an inference or that the question is capable of such an interpretation.

But the amount of the judgment is excessive and not

warranted by the evidence. The repairs were itemized and the cost of material, as testified to, amounted to \$57.45, and the labor thereon to \$86, making a total of \$143.45. There was no basis in the evidence for the amount of \$153 assessed by the jury. The judgment, therefore, will have to be reversed and the cause remanded unless plaintiff remits \$10.00 within fifteen days herefrom. If such remittitur is made the judgment will be affirmed to the amount of \$137.45. There can be no question, contrary to appellee's contentions, that the question of the excessiveness of the judgment was preserved for review by appellant's oral motion for a new trial.

AFFIRMED IN CASE OF A REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

Morrill and Gridley, JJ., concur.

120 - 27594

A. C. WHITNEY,
Appellee,

vs.

GEORGE H. TAYLOR, Jr.,
doing business as
GEORGE H. TAYLOR & CO.,
Appellant.

226 I.A. 658

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$1,000 claimed by appellee as his commission upon the sale of so-called Casey-Hudson preferred stock for appellant, as provided for in a written contract between them. The terms of the contract were that in consideration of appellee bringing the deal to appellant he was to have "for commission or expected profit" \$1,000 under one of two provisions. The second provision is the one here relied on. It is that appellee is to receive the \$1,000 after such time as he has sold \$15,000 worth of said stock on which there had been a net profit of 7½ points to appellant.

In the letter addressed to appellee containing these provisions, which were accepted by him, it is stated that such agreement "constitutes the full commission and satisfies all claims you may have in this matter for bringing the deal to us."

The trial was had before the court without a jury. Before the trial defendant was served with a subpoena duces tecum to bring with him and produce at the time and place of the trial "a certain ledger, cash receipt book, withdrawal book, customers' ledger, confirmation files, showing all sales of Casey-Hudson stock from September 1918 to date." Upon the failure of defendant to bring any books and papers in compliance with said subpoena

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Mathematics, 2019, Vol. 7, No. 10

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There will be a lot of things that you can do to help your business grow. You can start by looking at your website and making sure it is easy to use and that it has all the information that you need. You can also look at your social media presence and make sure you are posting regularly and that you are engaging with your followers. Another thing you can do is to look at your email list and make sure you are sending out newsletters and other emails that are interesting and useful to your subscribers. Finally, you can look at your advertising and make sure you are using the right channels and that you are targeting the right audience.

1. $\mathcal{F}(\mathcal{H}) = \{f: \mathcal{H} \rightarrow \mathbb{C} \mid f \text{ is analytic}\}$. Then $\mathcal{F}(\mathcal{H})$ is a Hilbert space with inner product $\langle f, g \rangle = \int_{\mathcal{H}} f(z) \overline{g(z)} d\mu(z)$.

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¹For example, "How 'Inevitable' Is 'Global Warming'?", *Virginia Slims* 10.

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secondary evidence from defendant's ledger was received in evidence over his objection. Such evidence was given by defendant's former book-keeper who had kept and was familiar with the books and had made a copy therefrom of the amount of the stock sold by appellee. Most of appellant's argument is directed against the admissibility of such evidence, he claiming that the subpoena was too general to give him an intelligent idea of what books to produce and did not give sufficient notice to produce, and hence a motion to quash the subpoena should have been granted, and that therefore the secondary evidence was inadmissible.

In this we do not concur. The subpoena referred to the books in which the account between the parties could be found and required only such as showed the sale of such stock. The subpoena was served in due time and no other notice than its service and contents was required. Decisions construing sec. 9 of Ch. 51 of the Rev. Stats. have no application to a subpoena duces tecum, which the clerk is empowered to issue under sec. 92 of the Practice Act.

It is also contended by appellant that there was no attempt to prove the net profits of defendant in such sales, and that net profits mean what remains after all the expenses of the venture have been paid. But it appears from the books of defendant, and is admitted by him, that in figuring the commission due its salesmen he added \$2.50 to the price of the stock to cover all the expense and the commission. It appears that he paid \$85 for the stock in question and figured commissions on the basis of sales over \$87.50 a share. It also appears not only from defendant's books but from the testimony of plaintiff, which is undenied, that the sales of said stock by plaintiff amounted to more than \$17,500. Plaintiff also testified to sales to an additional amount of \$3,000 and that there was a net profit of

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It is also necessary to consider the possibility of a change in the composition of the gas mixture. This is because the composition of the gas mixture can change over time, and this can affect the results of the analysis. Therefore, it is important to monitor the composition of the gas mixture and to make adjustments as necessary.

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\$12.50 a share on \$10,000, and \$7.50 net profit to defendant on the remaining \$10,000. It clearly appears, therefore, from plaintiff's uncontroverted testimony without considering the secondary evidence objected to, that he was entitled to the said commission of \$1,000.

Accordingly the judgment will be affirmed.

AFFIRMED.

Merrill and Gridley, JJ., concur.

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141 - 27616

JOHN H. HASKELL, Appellee,

vs.

H. W. NIMORE, trading as
H. W. NIMORE & COMPANY,
Appellant.

22674 658

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This suit was brought to recover a so-called bonus or deferred commission of one per cent alleged by appellee to be due him for sales of lots made while in the employ of appellant. A judgment was entered against defendant on the finding of the court in the sum of \$79.48, from which this appeal is taken. It is conceded that if appellee was entitled to any judgment it was for that sum.

The contract of employment was a verbal one entered into between plaintiff and defendant. The real question of fact at issue was whether the bonus or deferred commission was only conditionally payable, plaintiff contending that nothing was said with regard thereto, and defendant contending that it was expressly understood at the time of entering into the contract that plaintiff would not receive a bonus unless he remained in the employ of defendant or in case of his discharge, and that this was the rule of the office with respect to the other employees well known to the plaintiff.

It is agreed that plaintiff was to receive eight per cent of the purchase price of lots that he sold, and a bonus of one-half per cent when eighteen per cent of the purchase price of a lot was paid, and an additional one-half

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per cent when twenty-five per cent of the purchase price of a lot was paid. Before the bonus to the amount of the judgment matured plaintiff was discharged for "disorganizing the salesman," as defendant claimed. Plaintiff did not deny that there were grounds for the discharge. He was his only witness except as to the amount of sales. As to the terms of the contract defendant was corroborated by his general sales manager who had charge of the salesman and sales managers, hiring and discharging them when necessary. He testified that he had talked with plaintiff about commissions and bonuses, and that the latter acknowledged to him that he was to receive a bonus only as long as he remained in defendant's employ. We think there was a preponderance of evidence that nothing was due plaintiff as a bonus at the time he brought this suit. Accordingly the judgment will be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Morrill and Gridley, JJ., concur.

141 - 27616

FINDING OF FACT.

We find that under the terms of the contract sued on appellee, John H. Haskell, was not to receive a bonus on the sales of real estate made by him for appellant, H. W. Simons, in case such bonus became payable after he left or was discharged from appellant's employment, and that there was no bonus or deferred commission due him at the time he brought this action.

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312 - 27270

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
a corporation,

appellee.

vs.

NORTH AMERICAN FRUIT
EXCHANGE, a corporation,

appellant.

226 I.A. 658

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$149, rendered against defendant by the Municipal Court of Chicago in an action by plaintiff to recover a balance due for freight charges on a shipment of a carload of potatoes. The cause was tried before the court without a jury on an agreed statement of facts.

In plaintiff's amended statement of claim it is alleged in substance that plaintiff in connection with the Gulf, Colorado & Santa Fe Railway Company, was at the time of said shipment a common carrier in interstate commerce between Bonus, Texas, and Santa Fe and Albuquerque, New Mexico; that it was subject to the acts of Congress to regulate commerce and had filed with the Interstate Commerce Commission schedules or tariffs fixing the rate of freight charges between said points at 88 cents per one hundred pounds on a minimum carload weight of 20,000 pounds; that on June 12, 1914, one T. E. Tubbs delivered to said Gulf, etc., Railway Co., 39,335 pounds of potatoes, being a carload shipment, and said Tubbs and said Railway Co. executed a bill of lading covering said shipment, by the terms of which it was consigned to defendant, at Eagle Lake, Texas, and which bill of lading had the words "for diversion" written thereon; that on June 15th, upon arrival of the carload of potatoes at Eagle Lake, defendant delivered

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It was evident to the fact that the Government was not only not prepared to take any action against the Government, but also to take any action against the Government.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is assigned to the case. The investigator will then conduct a thorough search of the records and other sources of information to determine the facts of the case. The next step is to analyze the information and determine the cause of the problem. This is done by the investigator who will then prepare a report of the findings. The final step is to recommend a course of action to be taken to solve the problem. This is done by the investigator who will then prepare a report of the findings.

On August 15, 1964, the following information was received from the Bureau of the Census, Washington, D.C.:

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to said Gulf etc. Railway Co. a written diversion order directing it to divert or reconsign said shipment to defendant's own order to Santa Fe, New Mexico, "advise H.B. Cartwright & Bro."; that thereupon said Gulf etc. Railway Co. and plaintiff railway company transported the shipment to Santa Fe, N. M. and notified said Cartwright & Bro. of its arrival, who however refused to accept the shipment and to pay the freight charges thereon, and plaintiff notified defendant of such facts; that on June 30th defendant delivered to plaintiff a second written diversion order directing it to divert said shipment, "consigned to ourselves" (defendant), to Erickson & Cabin, Albuquerque, New Mexico; that in compliance with said last mentioned order plaintiff transported said shipment to Albuquerque, N. M. and notified Erickson & Cabin of the arrival thereof, who however refused to accept the same; that defendant was notified of such refusal but thereafter refused to make any other disposition of the shipment or to accept the same; that plaintiff, in order to prevent a total loss of the shipment, the same being perishable property, sold the potatoes for the best price obtainable and received therefor the sum of \$25, and applied the proceeds in part payment of the freight charges, which at the lawful rate amounted to \$174; and that there is due from defendant the balance of \$149. Defendant in its affidavit of merits denied that it owed plaintiff \$149, or any other sum, for freight charges on said shipment, and on the theory that defendant, in diverting said shipment, was merely acting as the agent of Tubbs, the original shipper, of which fact plaintiff had notice.

In the agreed statement of facts, upon which the cause was tried, it was stipulated that the facts alleged in plaintiff's amended statement of claim were true and that there was due plaintiff the sum of \$149, being the difference between the freight charges fixed by the lawful interstate tariffs and the amount

realized from the sale of the potatoes; that prior to and at all times mentioned in plaintiff's said statement of claim defendant maintained an office at Eagle Lake, Texas, and was then engaged in the business of selling for growers in that vicinity shipments of potatoes, and that for its services in finding a market therefor it was paid as commissions a certain percentage of the net amount realized from such sales; that defendant by its agents, prior to the shipment in question, orally notified agents of the plaintiff at Venus and Eagle Lake, Texas, that it was engaged in the sole and only business of selling on commission shipments of potatoes, and that its only interest in shipments consigned to it, or made or reconsigned by it, was that when the same were finally sold it would receive a commission for its services in disposing of the same."

The trial court found as a fact that no notice was given plaintiff at or prior to the time the shipment in question ^{was} delivered to it for transportation that defendant was not the owner of the potatoes, or that defendant was acting as agent for Tubbs, or anyone else, as regards this particular shipment or transaction. The court held as a proposition of law that: "By assuming control and giving diversion orders for said shipment of potatoes the defendant exercised the rights which only an owner can exercise, and, in addition to being liable for freight charges as consignee, it became liable as consignor under its new contracts for transportation to the diversion destination." The court found the issues against defendant and assessed plaintiff's damages at the sum of \$149, and entered the judgment appealed from.

We are of the opinion that the judgment was right and should be affirmed. We think that under the facts disclosed defendant was liable for the freight charges as a consignee. (Chicago, Indianapolis & Louisville Ry. Co. v. Monarch Lumber Co., 202 Ill. App. 20; Pittsburgh, Cincinnati, Chicago & St. Louis

Ry. Co. v. Pink, 350 U. S. 577; New York Central & Hudson River R. Co. v. York & Whitney Co., 356 U. S. 406). And as a consignee. (Portland Flouring Mills Co. v. British & Foreign Marine Ins. Co., 130 Fed. Rep. 860, 864; New York Central R. Co. v. Philadelphia & Reading Coal & Iron Co., 356 Ill. 307, 309). Even though plaintiff had knowledge that defendant's business was that of an agent or broker for others, when defendant executed in its own name the two diversion orders covering the shipment in question and did not notify plaintiff that it was acting as an agent and did not disclose the identity of its principal, defendant bound itself personally to pay said freight charges. (Theeler v. Reed, 36 Ill. 31, 90; Loebke v. Halsey, 83 Ill. App. 458, 467; Jackson v. Piowaty & Sons, 226 Ill. App. 329).

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Merrill, J., concur.

323 - 27281

THOMAS LEWICKI.

Appellee,

vs.

JOHN BONARESKI.

Appellant.

226 I.A. 659

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action for malicious prosecution, commenced by plaintiff, Lewicki, in the Superior Court of Cook County on June 10, 1920, the jury, after hearing evidence introduced by each party, returned a verdict finding the defendant, Bonareski, guilty and assessing plaintiff's damages at the sum of \$300. Judgment on the verdict was entered against defendant on June 25, 1921, and he appealed. Plaintiff has not filed any printed brief or argument in this appellate court.

It appears that on October 9, 1919, defendant filed his sworn complaint in the Municipal Court of Chicago charging in substance that on October 8th plaintiff feloniously obtained from defendant \$300 belonging to him by means and use of a trick, otherwise commonly called the "confidence game," with the intent to cheat and defraud him, contrary to the Statute, etc.; that a judge of said court examined the complaint and the complainant and endorsed on the complaint the statement that he was satisfied that there was probable cause for the filing of the same, and ordered that a warrant issue for the arrest of plaintiff; that plaintiff was arrested and gave bail; and that on October 21, 1919, plaintiff was discharged. In his declaration filed in the present action plaintiff alleged in substance that defendant "falsely and maliciously and without any reasonable or probable cause" charged plaintiff in said complaint with the

crime of "confidence game," and caused his arrest, and afterwards abandoned the prosecution of said complaint and plaintiff was discharged, etc.

Among the various points urged by counsel for defendant for a reversal of the judgment is that the evidence does not show a want of probable cause on the part of defendant in filing said complaint and in causing plaintiff's arrest. No useful purpose will be served in a discussion of the evidence. Suffice it to say that we have carefully reviewed the same and are of the opinion that it clearly shows that there was probable cause for the defendant taking the action that he did, resulting in the arrest of plaintiff, notwithstanding the fact that subsequently defendant abandoned the prosecution and plaintiff was discharged. In Glenn v. Lawrence, 280 Ill. 381, it is decided that proof of the element of want of probable cause is essential to the sustaining of an action for malicious prosecution, notwithstanding malice and all the other elements are proven, as want of probable cause cannot be inferred from malice and both malice and want of probable cause must be proved. In Harshman v. Whitney, 77 Ill. 32, 43, "probable cause" is defined as "such a state of facts, in the mind of the prosecutor, as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty." (See, also, Ross & Co. v. Innis, 35 Ill. 487, 504; McDavid v. Blevins, 85 Ill. 238, 241; Glenn v. Lawrence, 280 Ill. 381, 387). And it is for the plaintiff to show that there was not probable cause nor reasonable ground for the prosecution. (Glenn v. Lawrence, supra; Israel v. Frecks, 23 Ill. 575, 577.) And want of probable cause is not shown by the acquittal of the accused. (Anderson v. Friend, 85 Ill. 135, Tuebbecke v. A. M. Rothschild & Co., 152 Ill. App. 321, 324; Wlodarszewski v. Spoganitz, 209 Ill. App. 112) or by the

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and 1990, respectively, and the relationship is not linear.

The mean β_{11} estimate is 0.15, indicating that for each additional year of age, the probability of being employed increases by 0.15 percentage points.

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10. The following are the names of the persons who have been appointed to the various committees of the Board of Directors:

...which is given by the symbol σ and is defined as follows:

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Journal of Management Education 30(6)p.789-804

Page 21 of 21

voluntary dismissal of the criminal prosecution at the instance of the prosecuting witness (Olson v. Lawrence, 224 Ill. App. 411, 413.) And the question of probable cause is either a mixed question of law and fact, (Israel v. Brooks, *supra*), or "one of fact, to be determined from the evidence without regard to the finding of the examining magistrate," (Lynch v. Kauter, 285 Ill. 336, 341). In the instant case we have no hesitancy in finding as a matter of law from the facts, and also as an ultimate fact, that there was probable cause for plaintiff's prosecution in said criminal case. Our conclusion is that the judgment of the Superior Court should be reversed and it is so ordered.

REVERSED WITH FINDING OF FACT.

Barnes, P. J., and Morrill, J., concur.

[illegible]

323 - 27281

FINDING OF FACT.

We find as an ultimate fact in this case that there was probable cause for the prosecution of the plaintiff, Thomas Lewicki, in the criminal case commenced by the filing of a complaint by the defendant, John Benaraki, in the Municipal Court of Chicago on October 9, 1919.

436 - 27394

JOHN GERINGER and
JAMES STORKAN,
Appellants,

vs.

HARRY RONDELL, alias
HARRY RONDELL,
Appellee.

22C1A 359

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order entered by the Circuit Court of Cook County on August 24, 1921, vacating and setting aside for error coram nobis a judgment of \$717.66, entered by said court at the preceding term, on August 10, 1921, against defendant for want of a plea.

On May 24, 1921, plaintiffs commenced an action in assumpsit against defendant, who was duly served with process. The clerk's transcript discloses that on July 7, 1921, 11 days before the commencement of the July term on July 18, 1921, plaintiffs filed their declaration, in which it is alleged in substance that on October 1, 1914, David and Fannie Harris executed their promissory note for \$800, payable to plaintiffs 5 years after date, with interest at 6% per annum, secured by a trust deed on certain real estate which was thereafter conveyed to defendant; that the time of payment of the note was extended to October 1, 1920; that in consideration of said extension defendant, through an agent, on October 21, 1919, paid plaintiffs \$100 on said note and interest on the balance to October 1, 1920, and promised to pay the balance of the note when due as extended; that defendant in October, 1920, in consideration of a further extension of the time of payment to April 1, 1921, paid the interest on the note to April 1, 1921.

326 I.A. 329

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THE UNITED STATES DEPARTMENT OF JUSTICE

This is an appeal from an order entered by the

Circuit Court of the District of Columbia, on August 22, 1951, vacating and

reversing the order of the District Court, on August 22, 1951,

entered by said court at the preceding term, on August 22, 1951,

against defendant for want of a plea.

On May 24, 1951, plaintiff commenced an action in

the District Court of the District of Columbia, for the recovery of damages.

The plaintiff's complaint alleges that on July 7, 1951, at 11:00 a.m.

before the commencement of the July term on July 10, 1951,

plaintiff filed their declaration, in which it is alleged that

defendant had on October 1, 1951, failed to comply with

certain provisions of the Federal Reserve Act, to wit:

1. That defendant, with intent to defraud, received by

the first class on certain bank notes which were therefor non-

payable to defendant; that the time of payment of the note was

extended to October 1, 1951; that in consideration of said

extended deferral, through an agent, on October 11, 1951,

said defendant had on said date and interest on the balance

in default of \$100,000, and promised to pay the balance on the

note when the same was received; that defendant is guilty, in

violation of a Federal Statute of the District of Columbia in

that it had failed to comply with the provisions of said Act.

and agreed to pay said balance of the note when due as last extended; and that there is due plaintiff from defendant the sum of \$700, and interest thereon from April 1, 1921. On July 18, 1921, the first day of the July term, the appearance of defendant was entered by his attorney, but no plea was filed, and on August 10, 1921, defendant's default was taken for want of a plea and judgment nil dicit entered against him for \$717.58.

The bill of exceptions discloses that, after the term had passed at which said judgment was entered, defendant, having given due notice to plaintiffs' attorney, appeared and moved the court to vacate and set aside the judgment, and filed a petition praying that such an order be entered. While the paper is called a "petition" it is in effect a written motion to correct errors of fact under the coram nobis statute contained in the Practice Act. (Chap. 110, Sec. 89). In the petition, which is verified, the following facts in substance are alleged: That on July 18, 1921, one Abermen, a duly licensed attorney in Illinois and an employee of defendant's attorney, filed defendant's appearance in the cause, and, after doing so, thoroughly searched the files and examined the clerk's register on the same day; that no declaration of plaintiff's was then in the files, nor was such a declaration registered in the register as having been filed; that said Abermen therefore assumed that plaintiffs had chosen not to file their declaration in said cause until ten days before the following, August, term; that on Monday, August 13, 1921, being the first day of said following August, term, he again searched the files for said declaration and then and there discovered that the said judgment nil dicit had been entered; and that although defendant's appearance was on file on July 18, 1921, neither defendant nor his attorney was notified of the proposed taking of said default and judgment. Additional facts are stated

tending to show that defendant had a good and meritorious defense to the action, and the nature of such defense.

No demurrer, or other pleading raising a question of law as to the sufficiency of the facts stated in said petition, was filed by plaintiffs but on the contrary they joined issue on the facts and presented two counter affidavits tending to show that the clerk of the court was not guilty of the misprision as charged. A hearing was had upon the facts as presented and upon this hearing Rule 30 of the Rules of said Court was called to the attention of the court, which provides that "no action will be heard or order made in any cause without notice to the opposite party when an appearance of such party has been entered, except where a party is in default, or when a cause is reached on the call of the trial calendar."

We think it sufficiently appears, on the issues of fact presented to the court, that there was a misprision of the clerk in failing to keep the declaration in the files, and in failing to have the register show on July 18th that the same had been filed, which resulted in depriving the defendant, without negligence on his part or that of his attorney, of the opportunity of presenting a defense, apparently meritorious. It cannot be said that the action of the court in setting aside the judgment is manifestly against the weight of the evidence, which judgment the court would not have entered by default if it had then been cognizant of the facts as alleged in said petition. A misprision of the clerk of the court, in failing to keep the declaration in the files of the cause, and in failing to promptly make an entry of the filing thereof on the register, is such error as will warrant the vacation of a judgment after the term of its entry. (Domitzki v. American Linseed Co., 117 Ill. App. 292; affirmed 221 Ill. 161; Chapman v. North American Ins. Co., 292 Ill. 179, 185.)

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1. The defendant, an attorney at law, residing at 1234 Main Street, New York City, is the author of the following letterhead memorandum, dated and captioned as above, and is the author of the same.

It is a fact that the defendant, who is now in the custody of the authorities, has been found to be in possession of a large quantity of stolen goods, and it is also a fact that the defendant has been found to be in possession of a large quantity of stolen goods, and it is also a fact that the defendant has been found to be in possession of a large quantity of stolen goods.

The order of the Circuit Court is affirmed.

AFFIRMED.

Barnes, P. J., and Merrill, J., concur.

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FRANK EHRENHEIM, a minor,
by FRANK J. EHRENHEIM, his
next friend,

Appellee,

vs.

YELLOW CAB COMPANY,
a corporation,

Appellant.

2261A. 659

APPEAL FROM

SUPERIOR COURT.

COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$2,000, rendered by the Superior Court of Cook County on June 14, 1921, in an action for damages for personal injuries suffered by Frank Ehrenheim, a boy slightly over nine years of age, on April 23, 1920, about one o'clock p.m., and occasioned by his being knocked down and run over by defendant's automobile, commonly called a taxi-cab, at or near the southwest corner of North and Claremont Avenues in the City of Chicago.

Plaintiff and eleven witnesses testified in his behalf, and four witnesses, including the driver of the cab, testified in behalf of defendant. The jury returned a verdict finding the defendant guilty of the negligence charged and assessed plaintiff's damages at the sum of \$2000.

North avenue is an east and west street, intersected at right angles by Claremont avenue. There are double street car tracks in North avenue, east-bound cars moving on the south track and west-bound cars on the north track.

The evidence is undisputed that shortly before the accident, plaintiff together with his sister, one year younger than himself, were on their way to school, going south and approaching the west cross-walk of Claremont avenue; that they stopped at the curb line near the north-west corner of the

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intersection of the two streets; that plaintiff's sister remained there and did not attempt to cross North avenue and was still at said corner when the accident happened; and that plaintiff left his sister and ran south on or near said cross-walk immediately in front of a west-bound street car travelling in the north track and which did not stop. As to what occurred immediately after plaintiff had passed said street car the evidence is conflicting. The testimony of the driver of the cab, and that of defendant's witness, who was on the south side of the front platform of the street car, tended to show that plaintiff after passing the street car continued running across North avenue; that just as he reached a point in said street near the south curb, or reached the sidewalk south of the curb, he was struck by the left front corner of the cab, which had been going east at about 15 miles per hour between the south track and the curb; and that immediately before plaintiff was struck and run over, the driver of the cab, in the effort to avoid striking him, turned the front wheels of the cab sharply to the right over the curb and onto the south sidewalk. The testimony of some of plaintiff's witnesses tended to show that plaintiff was struck and knocked down by the right front corner of the cab, after he had reached the sidewalk and was standing thereon about seven feet south of the curb and about four feet west of the west curb of Claremont avenue; that at the time a large auto-truck, facing east, was standing on the east bound track, its front end being about even with the west line of Claremont avenue, and there was a horse and wagon standing near the south curb west of Claremont avenue and a short distance in the rear of the truck; and that the cab, travelling at about 25 miles an hour, dodged in between the horse and wagon and the truck, ran over the curb and upon the sidewalk and struck plaintiff.

It is first contended by counsel for defendant that the judgment should be reversed (a) because the evidence does not sufficiently establish any negligence on the part of the driver of the cab which was the proximate cause of the accident, and (b) because the evidence clearly shows that plaintiff did not exercise the degree of care that might reasonably be expected of a boy of his age, experience and intelligence, and was himself guilty of negligence, which proximately caused the accident. We are unable to agree, and are of the opinion that, under all the facts and circumstances in evidence, both of these questions were for the jury to determine.

It is also contended that the trial court erred in giving a certain instruction offered by plaintiff as to the measure of damages, that plaintiff's counsel in his closing argument to the jury made improper remarks, and that the excessiveness of the verdict discloses that the giving of the erroneous instruction and the making of the remarks were prejudicial to defendant.

As a result of the accident both of plaintiff's legs were broken and he suffered a severe nervous shock. He was promptly taken to a hospital where he remained several months and underwent several operations. At the time of the trial it was shown by the testimony of his attending physician that his right leg had healed and a good result had been obtained; that his left leg had healed except for a small open sore about the size of a dime, due partially to an infection in the bone, which sore would heal in the course of a year or so; and that the left leg was between a quarter and a half inch shorter than the right.

In the instruction mentioned the jury were told that, in estimating the damages, it would be proper for them to con-

sider the nature, extent and duration of such bodily injuries in so far, if at all, as has been shown by the evidence, and their effect, if any, upon plaintiff's ability to attend to his affairs generally, after he shall have attained the age of 21 years, in so far, if at all, as has been shown by the evidence." By this instruction the jury were told in effect that there was evidence in the case from which they would be warranted in believing that the injuries which plaintiff had received would affect his ability to attend to his affairs generally after he became 21 years of age (viz.: during the period of life beginning 11 years after the trial) and that they would be justified in taking that evidence into account in determining the amount of damages to be awarded. The testimony regarding plaintiff's injuries was confined principally to plaintiff's attending physician and two other physicians called by defendant, and there was nothing in their testimony indicating that, because of the injuries received, plaintiff's ability to attend to his affairs generally would be interfered with after he had attained the age of 21 years. All testified in substance that the small difference in the length of plaintiff's legs, which would permanently remain, would be of slight consequence and would not materially impair the usefulness of either. There was therefore no evidence on which to base the instruction and the giving of it was error. (Illinois Iron & Metal Co. v. Seber, 196 Ill. 526, 531). Moreover, plaintiff's counsel in his argument to the jury, said "He will always limp. That will always interfere with his personal appearance, with the front that he is to make to the world. * * * If you had a boy 9 years old, or if you were a boy 9 years old, would you take \$25,000 for what that little boy has had?" These statements were objected to, and, in sustaining the objection to the last statement, the court said: "It is not a question of what they would take." Yet, notwithstanding

the court's ruling, counsel continued: "Let these doctors get up there and testify until they are black in the face, getting \$10 an hour for it. That is all right. They can say that he has a perfect leg. He can call it a perfect leg if a short leg is a perfect leg. He can testify to that. Maybe that is worth \$10 an hour to say that. I think they would have to pay me more than that before they could get me to say it." This last statement was also objected to, and the court sustained the objection and told the jury to disregard the statement. These remarks, although to some of which objections were sustained, were, we think, prejudicial to defendant, and, when considered in connection with the large verdict and the erroneous instruction, require that the judgment should be reversed and the cause remanded for a new trial. (Chicago Union Traction Co. v. Lauth, 216 Ill. 176, 183; Appel v. Chicago City Ry. Co., 259 Ill. 561, 567), and it is so ordered.

REVERSED AND REMANDED.

Barnes, P. J., and Merrill, J., concur.

THE COURT'S HOLDING. The court's holding is that the government has a duty to protect the public from the danger of nuclear war. The court's holding is that the government has a duty to protect the public from the danger of nuclear war.

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THOMAS H. WILLIS, surviving
partner of the firm of
H. H. Walker & Co.,

Defendant in Error,

vs.

JAMES MORAN, PATRICK MORAN and
JACK MORAN,

Plaintiffs in Error.

2261A. 039

Error to

Municipal Court
of Chicago.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is sought by this writ of error to reverse a judgment of the Municipal Court of Chicago against the defendants in an action of forcible detainer.

Plaintiff alleges in his complaint, filed March 9, 1921, that he, as surviving partner of the firm of H. H. Walker & Co., is entitled to the possession of certain premises (described at length and situated in the south-west portion of said city) and that defendants unlawfully withhold the possession thereof from him. There was a hearing before the court without a jury. James Moran was represented by one attorney and Patrick and Jack Moran, by another. At the conclusion of plaintiff's evidence the attorney for James Moran practically admitted that as to said defendant plaintiff was entitled to a judgment for possession in the present action, by reason of said defendant having signed and acknowledged a certain agreement, hereinafter mentioned, with said firm of H. H. Walker & Co. on March 29, 1906. The attorney for Patrick and Jack Moran moved for a dismissal of the action as to both of them on the grounds in substance that the evidence did not warrant any judgment against them in a forcible detainer proceeding, that they claimed title to the

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Journal of Management Education 32(1)

It is noted by the FBI that the FBI is not aware of any other information regarding the activities of the group.

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related to a complex but diverse set of factors,

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Se peut-il alors affirmer que les personnes qui ont subi un traumatisme ont des troubles de la personnalité ?

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premises by adverse possession for a period of more than 30 years, that the real controversy concerned the title to the premises and not plaintiff's mere right to possession, and that plaintiff's remedy, if any he had, was by ejectment. The court stated in substance that before deciding the motion he desired to hear the testimony of all three defendants, and they severally testified. The court finally found that all three defendants were guilty of unlawfully withholding the possession of the premises from plaintiff, and, on April 16, 1921, entered judgment against them on the finding and ordered that a writ of restitution issue.

The evidence disclosed in substance the following facts: In the year 1895, about 26 years before the present action was commenced, the three defendants, brothers, together with their mother, Elizabeth Moran, a younger brother, Thomas, and two sisters, moved upon the premises which were then unoccupied and took possession. During that year the three defendants plowed and worked the ground and built a small house on the premises, in which all continuously lived until the death of Elizabeth Moran in the year 1909. During this period the mother, being without means, was supported by the three defendants. After the mother's death the three defendants continued to live in the house and occupy the premises down to the commencement of the present action. The defendants, Patrick and Jack Moran, claimed on the stand that they with their brother, James, were the owners of the premises, and they testified that they had never paid any rent for the premises to anyone. In June, 1908, the firm of H. H. Walker & Co., then consisting of H. H. Walker and plaintiff, commenced a forcible detainer action before a justice of the peace in Cook county against Elizabeth and James Moran, alleging that

On March 20, 1968, the following information was received from the
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information was received from the Office of the Legal Attaches, Washington, D.C.

the firm was entitled to the possession of the premises, and that Elizabeth and James were unlawfully withholding such possession from it. Patrick and Jack Moran were not made parties to the action. Elizabeth and James Moran were defaulted and adjudged guilty. Before a writ of restitution had issued the justice who entered the judgment died and his successor in office refused to issue the writ. In March, 1906, on petition of said firm of H. H. Walker & Co., the Circuit Court of Cook county ordered a writ of mandamus to issue to compel such successor in office to issue the writ of restitution, but it does not appear that such latter writ was ever issued. On March 29, 1906, Elizabeth and James Moran signed and acknowledged an instrument by which they agreed with said firm that they would upon 30 days' notice surrender possession of the premises and "remove the building thereon, if desired, without any expense or trouble" to said firm. This agreement was admitted in evidence on the trial as against James Moran, but the court sustained the objection of the attorney for Patrick and Jack Moran to its introduction as against them, they not being parties to it and it not appearing that they ever knew anything about it or its execution. On January 17, 1921, plaintiff caused a written notice to be personally served on James Moran on the premises, demanding that he surrender possession of the premises to the "undersigned" 30 days from date, viz: on February 16, 1921. The notice was signed "H. H. Walker & Co., by Thomas H. Willis," and stated on its face: "This notice is given pursuant to the agreement entered into by you with the undersigned on or about March 29, 1906." On January 25, 1921, plaintiff also caused a written notice, similarly signed, to be served on Patrick and Jack Moran on the premises, demanding that they surrender possession of the premises within 30 days from date, viz. on February 24, 1921, and containing the statement: "This

[illegible]

notice is given pursuant to the agreement entered into by your mother and brother, Elizabeth and James Moran, with the undersigned on or about March 29, 1900." Plaintiff testified at the trial that he, as a member of the said firm, visited the premises two or three times during the years 1895 to 1898 inclusive; that on one of these visits he had a conversation with Elizabeth Moran, at which she said that "she was glad to live there" and that "she made no claim to the property"; that he (plaintiff) thereafter, about once a year visited the premises; that he never talked with James Moran prior to 1902; that he never at any time talked with either Patrick or Jack Moran prior to the commencement of the present action; that in the year 1902, after the agreement above mentioned had been signed by Elizabeth and James Moran, he had a conversation with James Moran on the premises; that "I wanted him to pay rent, and he said he would look after the property and keep people from taking the dirt away for his rent." As to this conversation the court ruled that plaintiff's testimony was admissible as against James Moran, but not as against Patrick and Jack Moran.

After a careful review of the evidence contained in the present record we are of the opinion that the court erred in entering judgment against Patrick and Jack Moran. We fail to find sufficient evidence, as against them, that either said firm of H. H. Walker & Co., or plaintiff, ever was in possession of the premises, or that either ever had any right to the possession thereof. "One suing under the forcible entry and detainer act must show a right of possession in himself, and he cannot rely upon the lack of right in those whom he seeks to dispossess." (Fitzgerald v. Quinn, 165 Ill. 354, 366; Gaulerecki v. Oppenheimer, 283 Ill. 525, 530). "The person who is in the actual and peaceable possession of land will be deemed to be rightfully in possession,

and the burden of proof is upon him who would dispute that possessory right." (Witenschein v. Quinn, supra, and cases there cited.) It sufficiently appears, we think, that both Patrick and Jack Moran were in actual and peaceable possession of the premises at the time of the commencement of the present action and that they claim title to the premises by adverse possession for a period of more than 20 years. It may be that plaintiff, as surviving partner of the firm of R. M. Walker & Co., has a superior title to that claimed by Patrick and Jack Moran, but that question cannot be inquired into in this proceeding.

(Shoudy v. School Directors, 30 Ill. 288, 294; Smith v. Cook, 45 Ill. 250, 251; Kepley v. Luke, 106 Ill. 395, 397; Palmer v. Frank, 169 Ill. 90, 91; Thomas v. Glenick, 237 Ill. 147, 160.) The judgment was entered against all three defendants. It being erroneously entered as to Patrick and Jack Moran, and it being indivisible, it must be reversed as to all three defendants. (McCluskey v. Nelson, 179 Ill. App. 182, 183; Daymar v. Richardson Tanning Company, 308 Ill. 77, 82; Lynch v. Chicago & Erie R. Co., 299 Ill. 218, 226.)

For the reasons indicated the judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Morrill, J., concur.

COURTNEY R. MCNEILL,
as surviving partner
of John McCabe & Co.,
trading under the name
of Union Bank of South
Chicago.

Plaintiff in Error.

vs.

JOSEPH M. KRANE and
PETER SADOWSKI,
Defendants in Error.

2261.A. 659
KNOW TO

COUNTY COURT OF

COOK COUNTY.

MR. JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

This is an action in assumpsit, commenced on May 26, 1920, by plaintiff, as surviving partner, against defendants upon six promissory notes for \$50 each, executed by them as makers, dated June 22, 1910, and payable respectively 15, 20, 25, 30, 35 and 40 months after date to the order of John F. Ronkowski. On October 11, 1911, Ronkowski received \$350 from plaintiff's firm or bank, gave his note for that amount payable to it and at the same time endorsed and delivered to it, as collateral security, the six notes together with a seventh similar note for \$50. This transaction was consummated by Ronkowski and plaintiff, the latter acting for his firm. Plaintiff at the time knew Sadowski but did not know Krane, and Ronkowski made no statement to plaintiff as to the circumstances under which defendants executed and delivered their notes to Ronkowski. The seventh note referred to was afterwards paid, but no further payments were made by Ronkowski on his indebtedness to said firm, and defendants have not made any payments on the six notes in question. After the death in 1919 of John McCabe the firm's business and most of its assets were taken over by an incorporated bank, but the notes in question were not turned



and the other half of the total for the year.

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over to that bank, they not being regarded as acceptable assets, and the title to the notes remained in plaintiff as surviving partner.

There have been two trials of the cause. On the first the jury returned a verdict for \$400 in favor of plaintiff but a new trial was granted. On the second trial, in July 1921, it was agreed between the parties that, if anything was due plaintiff on the notes, the amount was \$428.72, but the jury returned a verdict finding the issues for defendants, and the court entered judgment thereon against plaintiff for costs, which judgment he by this writ of error seeks to reverse.

It appeared from the testimony of the defendant, Kranz, that in 1910 Monkowski was the owner of a saloon in South Chicago, and that on June 25, 1910, Monkowski sold this saloon to Kranz, the latter giving the former the six notes sued upon and two other similar notes in part payment of the sale. The defendant Badewski did not testify. It appeared from the testimony of plaintiff that in 1914 one William Oakes, then engaged in the collection business, informed plaintiff of the whereabouts of Monkowski whom plaintiff had not seen since 1911; that he (plaintiff) then turned over the six notes to Oakes, instructing him to collect the notes so that Monkowski's debt to the firm might be paid; that Oakes instituted suit in the Municipal Court of Chicago, in Monkowski's and not in plaintiff's name, but was unsuccessful in his efforts to make any collection; and that subsequently plaintiff received back the notes. The record is silent as to whether any final judgment was entered in this Municipal court suit. Defendants' attorney, on cross-examination of plaintiff, directed his attention to certain testimony which he had given on the former trial of the case and the manner in which this was done and the answers received

over to that book, they are being regarded as verifiable facts.
and the title to the subject remains in plaintiff as surviving
beneficiary.

There have been two trials of the cause. On the
first the jury returned a verdict for defendant in favor of plaintiff.
On a new trial was granted. On the second trial, in July 1931,
it was agreed between the parties that, if plaintiff was the
plaintiff on the issue, the amount was \$10,000, and the jury
returned a verdict finding the issue for defendant, and the
court entered judgment against plaintiff for \$10,000, with
judgment as by this writ of error made to reverse.

It appeared from the testimony of the defendant,
James, that in 1910 defendant was the owner of a house in
South Chicago, and that on June 22, 1912, defendant sold this
house to James, the latter giving the former the sum of
\$10,000 and two other notes in full payment of the
sale. The defendant admitted that he was guilty. It appeared
from the testimony of plaintiff that in 1912 one William Hansen,
then engaged in the oilseed business, informed plaintiff of
the ownership of defendant's house and that he had been since
1911; that he (plaintiff) then turned over the notes to
Hansen, instructing him to collect the notes on that defendant's
debt as the time might be paid; that Hansen informed him in the
Metropolitan Court of Chicago, in defendant's and not in plaintiff's
name, but was unsuccessful in his efforts to make any collection;
and that subsequently plaintiff received back the notes. The
court is asked to set aside any final judgment and award
in this judicial case with defendant's recovery, as herein
recommended by plaintiff, because his attention is drawn
to the fact that he was given as the owner of the house

from the witness tended, we think, to confuse the jury as to the real issues. The evident purpose of defendants' attorney was to create the impression in the minds of the jury that when Oakes received the six notes from plaintiff and brought the suit in the Municipal court he was acting for Ronkowski and not as plaintiff's agent, and that plaintiff had surrendered possession of the notes to Ronkowski. Plaintiff thereupon called Oakes as his witness, who testified that in April, 1914, he had a conversation with plaintiff and that during this conversation he received the six notes from plaintiff and undertook their collection. He was not allowed by the court to state the authority conferred upon him by plaintiff at the time, or what instructions he received.

It is here contended by counsel for plaintiff that under the circumstances the court's ruling constituted prejudicial error. We agree with the contention. In 2 Corpus Juris p. 935, sec. 690, it is said: "where the powers and duties of the agent are not reduced to writing, his testimony is competent to prove the facts in reference to the nature and extent of his authority." (See, also, Gould v. Norfolk Lead Co., 8 Wash. 338, 342; Phillips v. Foulter, 111 Ill. App. 330, 332; Richy v. Fred Miller Brewing Co., 180 Ill. App. 545, 547.)

Counsel for plaintiff also contend that the trial court erred in giving at defendants' request the following instruction:

"The court instructs the jury that if they believe from the evidence that the notes here sued upon were put up with the plaintiff by John Ronkowski as collateral security for a loan by plaintiff to said Ronkowski, and if you further believe from the evidence that afterward the plaintiff surrendered said notes back to Ronkowski unconditionally and for Ronkowski's sole purposes, then the jury are instructed that the plaintiff cannot recover herein and you will find the issues for the defendants."

We fail to find any evidence in this record that plaintiff "surrendered said notes back to Bankowski unconditionally and for Bankowski's sole purposes." It was error to give the instruction as it was calculated to mislead the jury.

(Indianapolis & St. Louis N. Co. v. Miller, 71 Ill. 463, 469;
Schlender v. Chicago & Southern Traction Co., 253 Ill. 154,
162.)

For the reasons indicated the judgment of the County Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Merrill, J., concur.

THEY ARE THE ONLY TWO WHO HAVE BEEN

RECEIVED BY THE PRESIDENT AND VICE PRESIDENT

AND THE SECRETARY OF THE ARMY AND NAVY

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RECEIVED BY THE PRESIDENT AND VICE PRESIDENT

AND THE SECRETARY OF THE ARMY AND NAVY

THEY ARE THE ONLY TWO WHO HAVE BEEN

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

WILLIAM O'HERN,

Plaintiff in Error.

226 I.A. 680
ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On April 7, 1921, an information was filed in the Municipal Court of Chicago charging the defendant, William O'Hern, with the criminal offense of having voted fraudulently in the 41st precinct of the 29th Ward, Chicago, at the general election held on April 5, 1921. Defendant was arrested and gave bail. Subsequently an amended information was filed in which it was alleged that defendant

"On April 5, 1921, at the City of Chicago, aforesaid, did then and there knowingly, willfully and fraudulently vote in the 41st precinct of the 29th ward, situated at 6254 Kedzie Ave., in the City of Chicago, County of Cook and State of Illinois, and then and there knowingly, willfully and fraudulently voted at said general election in and upon a false, assumed and fictitious name, in and upon the name of Louis Gillan, in and upon a name not his own and without having a right to vote therein, in violation of Section 256, Article 6 of Chapter 46 of Revised Statutes, 1919, of the State of Illinois, contrary, etc."

On September 22, 1921, defendant moved to quash the information, which motion was denied, and defendant, on being arraigned, pleaded not guilty. A trial was had before a jury and they returned a verdict finding defendant "guilty in manner and form as charged in the information herein." Defendant's motions for a new trial and in arrest of judgment were denied, and on October 8, 1921, the court adjudged that defendant "is guilty of the criminal offense of knowingly, willfully and fraudulently voting in and upon a false, assumed and

CONFIDENTIAL

THE UNIVERSITY OF CHICAGO

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1997年10月1日起, 凡在境内销售货物或提供应税劳务, 以及进口货物的单位和个人, 均应按销售额或营业额的一定比例计缴增值税。

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Received 10 April 2003; accepted 10 July 2003

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fictitious name, in manner and form as charged in the information, on said verdict of guilty," and sentenced him to nine months in the House of Correction in Chicago. This writ of error is used out to reverse the judgment. No bill of exceptions is contained in the transcript.

The sole ground here urged for a reversal of the judgment is that the information fails to sufficiently charge a crime. Counsel for defendant argues that it was necessary to aver in the information (a) that the election was held in pursuance of law (b) that it was held for some public office and (c) that the person whom defendant was charged as impersonating was a qualified voter of the precinct.

The section of the statute, (Hurd's Stat. 1919, Chap. 46, article 6, section 226) upon which the prosecution is based, reads in part as follows:

"If, at any election hereafter held in any such city, village or incorporated town, any person shall falsely personate any elector or other person, and vote or attempt or offer to vote in, or under the name of such elector or other person;

Or shall vote, or attempt to vote, in or upon the name of any other person, whether living or dead, or in or upon any false, assumed or fictitious name, or in or upon any name not his own; * *

Every such person, upon conviction thereof, shall be adjudged guilty of a misdemeanor, and shall be punished by imprisonment in the county jail for not less than three months nor more than one year."

We are of the opinion that the information was sufficient to sustain the judgment. It stated the offense substantially in the terms and language of the statute, and sufficiently apprised the defendant with reasonable certainty of the nature of the accusation against him so that he had ample opportunity to prepare his defense. (Brennan v. People, 113 Ill. App. 361, 365; People v. Becker, 179 Ill. App. 446, 450; Loehr v. People, 132 Ill. 604, 610; Cole v. People, 84 Ill. 216, 217; Worton v. People, 47 Ill. 468, 475.) In Sec. 408 of our Criminal Code (Hurd's Stat. 1919, Chap. 38) it is provided: "Every indictment or accusation as an

grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statutes creating the offense, or so plainly that the nature of the offense may be easily understood by the jury.* and we do not think it was a necessary averment that the person under whose name defendant voted was a qualified voter of the precinct. The gist of the charge in the information, following the statute, is that defendant knowingly and fraudulently voted at the general election on April 5th, upon a false, assumed and fictitious name and not his own. And the courts will take judicial notice of the date of a general election, the result thereof, of other facts in relation thereto (18 Cyc. 869), and of the officers to be voted for at such election. (15 Culling Case Law, p. 1108, sec. 38). In Wilson v. State, 53 Ala. 299, 302, it is said: "The times of holding the general elections are prescribed by law and are judicially known. When the indictment charges that at a general election held at a particular time the defendant voted more than once, the court can from the averment determine whether it was a general election, held under authority of law, and knows what officers were to be chosen, and what officers were of necessity voted for." (See, also, State v. Winnick, 15 Iowa 123, 125; Gay v. City of Eugene, 63 Ore. 389, 295; Diener v. Star-Chronicle Pub. Co., 230 Mo. 613, 623.)

For the reasons indicated, the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Barnes, P. J., and Merrill, J., concur.

Journal of Management Education 32(10)

40. The company has stated that it cannot be held liable for the actions of its employees.

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For further information, please contact the following:

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all small, single-celled organisms, but not all of them.

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JOSEPH J. MOORE, Appellee.

vs.

CHARLES E. FRAZIER, ALEXANDER
J. JOHNSON, and JOSEPH P.
GEARY, as Civil Service
Commissioners of the City
of Chicago,
Appellants.

226 I.A. 660

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County, entered October 22, 1921, wherein it was adjudged that the proceedings of respondents, as Civil Service Commissioners of the City of Chicago, as set forth in their return to a writ of certiorari theretofore issued in the cause, be quashed, and that petitioner's petition be sustained, in the matter of the charges against him.

It is alleged in substance in the verified petition, filed July 27, 1921, that long prior to the year 1919, petitioner was duly appointed, under the act regulating the civil service in cities and under the Rules of the Civil Service Commission of the City of Chicago, as a detective sergeant in the department of police in said city, and faithfully discharged the duties of his position until on or about December 30, 1918; that on December 12, 1919, the then general superintendent of police filed with said commissioners written charges of "conduct unbecoming a police officer," and specifications in support thereof (set forth in full), under section 12 of said act and under said rules; that petitioner received due notice of the hearing and a copy of the charges; that on December 30, 1919, the Commission rendered a finding and decision, signed by two of its members, Johnson and Geary, that petitioner was

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the activities of the British Security Co-ordination Committee (BSCC) in the United States.

[illegible]

"guilty as charged" and that he be "discharged from the Police Department and from the service of the City of Chicago;" that none of the evidence offered on the hearing of the charges was preserved in or made a part of the records of the Commission; that petitioner was denied a fair hearing and the opportunity to be heard in his own defense; that no evidence was offered tending to show his guilt; that said Commission was without jurisdiction to enter the finding and decision; that on January 27, 1920, within 30 days from the date of the rendition of said finding and decision and in compliance with the Rules of the Commission, petitioner filed with the Commission a written application for a rehearing on the charges, but that the Commission has never taken any action upon the application, either to deny or to grant the same, although petitioner has frequently requested such action; that one of said Commissioners has, from time to time since the filing of the application, represented to and assured petitioner that his application would be granted; that on this account, and relying upon said representations and assurances, petitioner has heretofore refrained from filing a petition for certiorari; and that said Commission now refuses to act upon the application. The prayer of the petition was that the court order that a writ of certiorari issue, commanding the Commissioners to certify and bring the record of their proceedings in this behalf into court, together with said charges and said application for a rehearing, and that their finding and decision be set aside. On August 1, 1921, the court ordered that the writ issue.

On September 16, 1921, the respondents filed their written motion to quash the writ and to dismiss the petition on the grounds that the petition showed on its face (1) that the action was prematurely brought in that on January 27, 1920,

"Guilt is whetted" and that he is "disturbed" from the time
 of the murder and from the murder of the day of the murder;
 none of the evidence shown on the murder of the murder was
 presented in or made a part of the evidence of the murder;
 their guiltiness was denied a fair hearing and the government
 as he heard in his own defense; that no evidence was offered
 showing he was his guilt; that said defendant was without
 justification to enter the finding and decision; that on January
 17, 1936, which is the date of the commission of said
 finding and decision and is consistent with the time of the
 commission, defendant filed with the Commission a written
 application for a rehearing on the charges, but that the
 Commission has never taken any action upon the application,
 either to deny or to grant the same, although defendant has
 repeatedly requested such action; that one of said commissioners
 has been dead in that state for years of the commission;
 defendant is not satisfied with the Commission's action
 in regard; that on this ground, and relying upon said
 representations and statements, defendant has demanded the
 return of said writs of habeas corpus and that said
 Commission has refused to act upon the application. The error
 of the petition was that the same stated that a writ of
habeas corpus issued, commanding the Commission to modify its
 order and return of said writs of habeas corpus to said writs
 which defendant will deny and will respectfully ask a
 rehearing and that their finding and decision be set aside.
 In support of this, the writ prayed that the writ issue.
 On September 14, 1936, the respondent filed with
 the court a motion for leave to amend the petition and petition
 as the grounds that the petition stated on the face of it that the
 writs were previously granted in that on January 17, 1936,

petitioner filed with the Commission an application for a rehearing of the charges and said application is still undisposed of, and (2) that certiorari is not the proper remedy, but rather mandamus to compel a rehearing of the charges. On the following day, September 17th, before said motion had been heard, respondents filed their return in obedience to the writ.

In the return to the writ there is set forth the filing of the charges and specifications mentioned; the notice of the hearing given to petitioner; the finding and decision of the commission on December 30, 1919, substantially as alleged in the petition; the transmission of such finding and decision to the General Superintendent of Police; his report, dated January 9, 1920, showing petitioner's actual discharge from the service; and the fact that on January 27, 1920, petitioner filed his petition for a rehearing with the Commission, and that on the same day the same was "received and ordered filed." Accompanying the return is the certificate of the Secretary of the Commission, and keeper of the files and records thereof, that the above and foregoing is a true and complete copy of the record of the proceedings had before the Commission in and about the investigation of the charges against petitioner, and that the "above and foregoing comprises all proceedings, records, papers, and files in the aforesaid matter" in the keeping of the Commission up to and including July 27, 1921. No transcript of any evidence introduced on the hearing is contained in the return, nor is there a recital of what facts the evidence, if any, tended to prove.

On October 4, 1921, petitioner filed in the Circuit Court his written motion to quash the record as returned upon the grounds that it failed to show that respondents had jurisdiction to enter the order of discharge, or that any cause for the discharge was proven, and that, hence, the discharge was void.

The common law writ of certiorari lies to review a

proceeding by the Civil Service Commissioners for the removal of a police officer appointed under the civil service rules and regulations. (City of Chicago v. Candell, 304 Ill. 598, 597.) And under the return in this case the judgment appealed from was right. "In the case of a subordinate tribunal of limited jurisdiction, created by statute, such as the Civil Service Commission, it is fundamental that jurisdiction must affirmatively appear on the face of the proceedings, and that no presumption will be indulged in favor of it, as in the case of a court of general jurisdiction." (Lindblom v. Leherky, 108 Ill. App. 14, 24; Funkhouser v. Coffin, 321 Ill. App. 14, 16; Tannewell Coal Co. v. Industrial Commission, 337 Ill. 465, 467.) The record filed in return to the writ "must show that the board acted upon evidence and contain the testimony upon which the decision was based, in order that the court may determine whether there was any evidence fairly tending to sustain the order." Tannewell Coal Co. v. Industrial Commission, *supra*; Funkhouser v. Coffin, 301 Ill. 257, 261.) "The record must show facts giving the inferior tribunal jurisdiction, and mere conclusions of law are not sufficient." Hahnemann Hospital v. Industrial Board, 332 Ill. 316, 318; Funkhouser v. Coffin, *supra*.) The finding of the Commission on December 30, 1919, that petitioner was "guilty as charged" was a mere conclusion of law. (Funkhouser v. Coffin, *supra*.)

Counsel for respondents here contend that the court should have quashed the writ upon the ground that petitioner had lost by laches any right he might have had to quash the proceedings, it appearing that petitioner did not apply for the writ until substantially one and one-half years after he had been discharged. It does not appear that this point was made in the Circuit court, or any question there raised as to the sufficiency

...by the Civil Liberties Commission for the purpose
 of a public hearing on the subject of the
 Commission. (See also, Civil Liberties Commission, 1954, p. 107.)
 and under the terms of this report the Commission appears to
 be in the state of a permanent institution of limited
 powers.

...in the case of the Civil Liberties Commission, it is to be understood that the Commission must also be understood
 as being an institution of the Government, and that the Commission
 will be required to report to the President of the United States
 and to the Congress. (See also, Civil Liberties Commission, 1954, p. 107.)
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of the allegations of the petition in excuse of the delay in filing the petition for the writ. In Myrskog v. Finch, 99 Ill. 171, 179, it is said: "Were lapse of time, alone, short of the limitation for prosecuting a writ of error, will not bar the issuing of a common law certiorari; and in order that it may be barred by laches, it must appear that since the making of the record sought to be reviewed, and upon its assumed validity, something has been done so that great public detriment or inconvenience might result by declaring it invalid." (See, also, Drainage Commissioners v. Volks, 165 Ill. 243, 248; Matthieson v. Ott, 268 Ill. 569, 578.) In the cases of City of Chicago v. Condell, 224 Ill. 595, and Clark v. City of Chicago, 235 Ill. 113, it was held that, in analogy to the statute providing that certiorari shall not issue to review a judgment of a justice of the peace more than six months after the rendition thereof, a petition for the common law writ of certiorari to review acts of civil service commissioners should be filed within six months from the entry of the order sought to be reviewed, unless the petition discloses a satisfactory explanation for the further delay. This limitation appears to have been adopted in order to minimize the detriment to the public, because of the rule then existing, entitling a reinstated officer or employee to recover his back salary from the date of his discharge. Under such rule, if the position of the discharged officer or employee had been filled by another who was being paid, the public was exposed to the danger of having to pay two salaries for one service. These cases were distinguished in the later case of Schlusser v. Commissioners, 285 Ill. 214, 216, where it was held in substance that they had no application to a case where such possible detriment to the public was not present. In the cases of People v. Schmidt, 281 Ill. 211, and People v. Dardett, 283 Ill. 124,

it has been definitely established, overruling the former rule, that a de jure officer or employee, who has been for a time wrongfully prevented from discharging the duties of his position, cannot recover from the State or other governmental subdivision the salary for such time, where it has been paid to a de facto officer or employee who has discharged the duties of the position during the suspension of the de jure officer or employee. Hence, in the present case, it does not appear that any detriment or inconvenience to the public has resulted from petitioner's delay in filing his petition, or can result from the court reaching the proceedings. Furthermore, we think that the allegations of the petition disclose good reasons for petitioner not having filed it at an earlier date. These allegations must be taken as true. (4 Ency. Fl. & Prac. 530; Ottow v. Lehr, 66 Ill. 54.) It appears that after petitioner had filed his application for a rehearing under the rules, the Commission received it and ordered it filed, but took no action either to grant or refuse it; that one of the two commissioners who sat at the original hearing gave to petitioner from time to time definite assurances that the application would be granted; and that, in other words, petitioner was "strung along," he relying on such assurances until he became convinced that no action would be taken on the application, whereupon he filed the petition. It was the duty of the respondents to pass upon the application for rehearing within a reasonable time. They were derelict in their duty, and petitioner was deceived as to their future course of action. They cannot now say that petitioner was guilty of laches.

Counsel for respondents also here make the contention, inconsistent with that last above discussed, that the petition was prematurely filed, because petitioner's application for a rehearing had not then been disposed of. There is no merit in this contention. It appears that the judgment of the

Commission discharging petitioner from his office or employment was in form and in fact a final judgment, entered on December 30, 1919; that the Commission immediately notified the general superintendent of police of its finding, and that shortly thereafter such superintendent reported that petitioner had actually been discharged. The pendency of the application for rehearing did not stay the discharge.

For the reasons indicated the judgment of the Circuit Court is affirmed.

AFFIRMED.

Barnes, F. J., and Merrill, J., concur.

Christianity is a religion of love and of service to the world. It is a religion of peace and of unity. It is a religion of hope and of faith. It is a religion of love and of service to the world.

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101 - 27575

ARTHUR HAINS, doing business
as The Western Ignition Company,
Appellant,

vs.

C. A. MISCHENORE,

Appellee.

226 I.A. 680

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment in his favor for \$73.09, rendered by the Municipal Court of Chicago on October 21, 1921, in an action tried before the court without a jury, in which plaintiff sought to recover the sum of \$123.49 for labor and materials furnished in repairing defendant's automobile, and also the sum of \$35 for attorney's fees in bringing the action. Defendant filed a claim of set-off, which the court allowed to the extent of \$49.50. But the court properly refused to allow the claim for attorney's fees.

The main contention here urged by plaintiff's counsel is that the court's action in allowing defendant's set-off to the extent mentioned is against the weight of the evidence and against the law. No printed brief or argument is here filed by defendant.

No useful purpose will be served in detailing the evidence contained in the somewhat voluminous record. Suffice it to say that we have carefully read the abstract and parts of the record and do not think that the finding and judgment should be disturbed, and accordingly the judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Merrill, J., concur.

135 - 27609

ANTON BACA and KATARZNA
BACA,

Appellants,

vs.

GUSTAVE A. ALBRIGHT,
Appellee.

226 I.A. 630

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is a forcible detainer action commenced by plaintiffs on October 1, 1921, to recover from defendant the possession of "the lots of ground and one and two story brick building known as house numbers 2309 to 2313 West Chicago Avenue" in the city of Chicago. The cause was tried before the court without a jury, resulting in a finding and judgment November 12, 1921, in favor of defendant and plaintiff appealed.

On March 15, 1920, Charles F. Thome, the then owner, by written lease devised the premises and building, to be occupied as "an automobile garage and dwelling" to defendant, from April 1, 1920, to August 31, 1927, at a stipulated rental. The instrument was drafted on a printed form of lease commonly in use. The words "an automobile garage and dwelling" were written in ink. By the printed ninth clause of the lease, the lessee covenanted that "there shall not be kept or used on said premises * * gasoline * * or any burning fluid or chemical oils, without the written permission" of the lessor, and that the "using on said premises or contiguous thereto of gasoline * * is absolutely prohibited unless permitted in writing hereon." Thome, several years prior to the execution of the lease, erected the building on the premises for himself. He designed the ground floor for use as a public garage. He caused to be installed, outside the building and underground, a

000-41082

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a genuine anti-apartheid organization or a front organization for the South African Government.

large gasoline tank, with connection to convey the gasoline into and on the ground floor of the building where there was a pump. After defendant took possession under the lease he used the ground floor as a public garage, where automobiles were stored and housed and gasoline and automobile oils frequently sold to customers and delivered into their automobiles as requested, and continued to do so down to the time the present action was commenced. After the execution of the lease and while Thoms remained the owner of the building, he several times had automobiles repaired on the premises and purchased gasoline from defendant. He knew that gasoline and automobile oils were frequently used and sold to defendant's customers on the premises, never objected and regularly received the monthly rent from defendant. On June 8, 1921, Thoms conveyed the premises and building to plaintiffs and on the same day assigned on the back of the unexpired lease his interest therein and in the rent secured thereby to them, and they accepted the assignment. After this transfer plaintiffs refused to accept the monthly rent tendered to them by defendant on the first day of each month. On August 10, 1921, plaintiffs, as owners of the premises by virtue of such transfer, served a written notice on defendant to the effect that they insisted on a strict and exact compliance by him with all the terms and provisions of the lease, and that, in the event of his "failure strictly and exactly to comply with all the terms and provisions of said lease or with each and every one of the covenants and agreements and conditions thereof," they would forfeit and terminate defendant's lease and tenancy. On September 16, 1921, plaintiffs served upon defendant another written notice, wherein defendant was notified that in consequence of his default in keeping or using on the premises gasoline or chemical oils without the written permission of the lessor or of plaintiffs, the lessor's grantees, they

had elected to terminate the lease, and defendant was further notified therein "to quit and deliver up possession of the same and said premises within 10 days." After the service of said notices defendant continued to use and sell on the premises as before gasoline and automobile oils, and did not quit or deliver up the premises, whereupon plaintiffs commenced the present action.

The Century Dictionary defines a garage as "a station in which motor-cars can be sheltered, stored, repaired, cleaned, and made ready for use; * * a stable for motor cars." It therefore appears that the term is somewhat broader in its meaning than, as contended by counsel for appellants, a place merely for the housing or storing of automobiles. When Thoms executed the lease of March 15, 1926, to defendant, wherein it was provided in the written portion that the premises devised should be occupied "as an automobile garage and dwelling," and when at that time the ground floor of the building was designed and equipped for a public garage, we think it clear that it was the intention that said ground floor should be used during the term of the lease by defendant as a public garage, where customers of defendant might not only have their automobiles sheltered or stored, but repaired and made ready for use. It is well known that most automobiles are propelled by the use of gasoline and oils and such is necessary to their movement. As at present conducted no public garage could exist without the keeping and using of gasoline and automobile oils. Most automobiles could not be repaired and made ready for use therein without them. The printed ninth clause of the lease is therefore inconsistent with and repugnant to the devise, and if its provisions were enforced the estate devised would be depreciated or destroyed. Furthermore, it is well settled law that where a printed form is used and filled out in writing the written part will control in construing a contract or deed; (American Express Co. v. Finckney, 20 Ill. 392;

Leavers v. Thomas, 150 Ill. 479, 487; Miller v. Powers, 227 Ill. 392, 402); and that the construction given to a contract by the parties themselves, as shown by their acts under it, may be resorted to as a means of determining the true intention they had in view in entering into the same. (Leavers v. Cleary, 75 Ill. 349, 353; Vermont Street E. P. Church v. Bross, 104 Ill. 206, 212.) The evidence shows that after defendant went into possession under the lease and until Thomas sold the premises and assigned the lease to plaintiffs, Thomas knew that defendant was conducting a public garage business on the ground floor of the building and was keeping, using and selling gasoline and automobile oils to his customers, and that he made no objection but accepted the monthly rent regularly.

Our conclusion is that the finding and judgment of the Municipal Court were right, and that the judgment should be affirmed, and it is so ordered.

AFFIRMED.

Barnes, P. J., and Merrill, J., concur.

144 - 27619

W. F. CUMMINGS, a corporation,
appellee,

vs.

CITY OF CHICAGO, a municipal
corporation,
appellant.

226 I.A. 660

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the City of Chicago from a judgment after verdict for \$35,762.00, rendered against it in favor of the plaintiff by the Circuit Court of Cook County, on November 19, 1921.

The action is in assumpsit, commenced on July 31, 1919. The declaration consists of four special counts and the common counts, based upon a written contract between the parties and set out in hæc verba in the first special count. It provides for the furnishing and installing by plaintiff of certain specified cables in underground conduits in said city for street lighting. Plaintiff alleged in the special counts in substance that it was ready, willing and financially able to do the work, but that defendant prevented it from performing the contract and thereby deprived it of profits which it would have made from performance. Defendant filed a plea of the general issue.

The contract was let to plaintiff on August 5, 1918, by order of the City Council, which had previously on March 26, 1918, passed an appropriation ordinance for the year 1918, which provided inter alia for an appropriation for the "Extension of the Electric Street Lighting Systems" of the city in various sub-station districts, including the Northwest-Sub-Station District, otherwise known as the "C" District,

and which is the district involved in the contract in question.

The appropriation for said district was as follows:

"SOUTHWEST SUB-STATION DISTRICT"

"Constructing a new street-lighting system, including the building of a transmission line, and sub-station, the installation of posts, poles, conduits, circuits, transformers and fixtures, the purchase of real estate, and the starting of approximately 6,500-100 C. P. and 117-000 C. F. lamps.

| | |
|--------------------------------|---------------|
| Total estimated cost | 3800.000 |
| 460-A-7 TO be expended in 1918 | \$792,030.49" |

The total appropriation, including the above and other items was \$8,031,110.22. The bids for the work covered by plaintiff's contract were opened on April 10, 1918, and the contract, which included the specifications for the work, was finally executed by the parties under date of August 22, 1918. Under its terms and provisions, plaintiff agreed

"to furnish and install feeder and transmission cables * * which shall include the furnishing of all cable, and all material, labor, tools, and appliances to install such cable in underground conduits, in an approved manner, complete and ready for service during the year 1918, and shall comprise the complete installation of a feeder cable system composed of eight (8) conductor, four (4) conductor and single conductor lead covered cable necessary for the installation of approximately five thousand (5000) 100 candle power, type C. Wanda lamps, for series street lighting in 'O' district; also the installation of a three (3) conductor, 12,000 volt transmission cable from the R. A. Waller Sub-station * * southwest to a center of distribution for 'O' district, the boundaries of which district are shown on drawings numbered 8803 and O-1988; the following approximate quantities of feeder and transmission cable are contemplated for 'O' district to be installed during the year 1918; 37,500 feet of 3-conductor cable, 3,300 feet of 4-conductor cable, 31,000 feet of 3 conductor 3/4 cable, also connecting cable, installing potheads, and pulling out of sight, four and single conductor cable at various locations in the city, as conditions may require and the Commissioner of Gas and Electricity * * may direct; said work shall be done in accordance with plans prepared for the doing of the same on file in the office of the Department of Gas and Electricity, * * and such additional approved plans to show locations and quantity of the work which are to be prepared as the work progresses, and in accordance with the specifications appended hereto and made a part of this contract; said work shall be commenced as soon after the signing of the contract as drawings are furnished, shall progress regularly and uninterruptedly, except as shall be otherwise ordered by the Commissioner of Gas and Electricity, and be furnished and fully completed on or before December 31, 1918, the time of commencement.

rate of progress and time of completion being essential conditions of this contract."

It thus appears that plaintiff agreed to perform two classes of work, viz.: (1) furnishing and installing cables, etc., which was a definite, fixed and determined amount of work, and (2) pulling out certain conductor cables at various locations, as conditions might require and the Commissioner of Gas and Electricity might direct, which latter class was indefinite, indeterminate and incidental and dependent upon future directions to be given by said Commissioner. Certain provisions contained in part IV of the specifications render this more apparent, where, under the sub-head "Removals," it is provided that said Commissioner "may elect" to require the pulling out of cable now in ducts in various sections of the city and the "placing of such cable on reels to be supplied by the contractor", and where, under the sub-head "Hauling Cable," it is provided that said Commissioner "may elect" to require the contractor to haul cable which has been removed from ducts in various sections of the city from one location to another, the contractor to "stipulate the price per reel of cable per mile for which he will haul such cable."

It was also provided in the contract that "the City of Chicago hereby agrees to furnish to the contractor the necessary drawings for the performance of the work herein specified." And in the specifications it was provided that "as soon as practicable after the award of the contract, detail working plans for the work will be furnished the contractor; the work is to be done in 1918."

On December 18, 1918, prior to the time originally fixed for the completion of the contract (December 31, 1918), the Commissioner recommended to the City Council that the time of completion of the contract, "No. 6286, V. F. Cummings, for installation of feeder and transmission cables," together with

There is no doubt that the above is a true statement of the facts of the case. The only question is whether the above is a true statement of the facts of the case.

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classmate of mine, who is (1) intelligent and friendly.

Source: The authors' calculations from the 1997 and 2001 data on the number of

There are 26 small slivers and two others on the far right hand side. The

1. What is the purpose of the study?

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE BY THIS DATE

...to be supplied by the contractor, and shall be the property of the contractor.

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 75 million in 1900 to over 200 million in 1950. At the same time, the population of rural areas has decreased from about 25 million in 1900 to about 10 million in 1950. This has led to a concentration of the population in urban areas, which has had a number of important consequences. One of the most important is that it has led to a change in the way of life of the majority of the population. In rural areas, the population is more closely tied to the land, and the way of life is more traditional. In urban areas, the population is more mobile, and the way of life is more modern. This has led to a number of changes in the economy, in the culture, and in the social structure of the United States. For example, the economy has become more industrialized, and the culture has become more diverse. The social structure has become more complex, and the role of the government has become more important. All of these changes have been a result of the process of urbanization, and they have had a profound impact on the United States.

2. Salvo to lower than before and no change in administration of estate.

U.S. DEPARTMENT OF AGRICULTURE

aplikacijami, ki pomagajo v delu. Najbolje so aplikacije, ki nudijo informacije in jih

and all the other things that I have seen and heard of in the world.

*.XIII of book of U of New and Hampshire and individual of the

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40. I have no personal knowledge of the person named in the above caption.

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Revised: 11/11/2011

three other contracts, he extended until July 1, 1919, and on January 20, 1919, the City Council passed an order authorizing him to make the extension. The other three contracts were "No. 6300," for "underground construction;" "No. 6264" for "part construction pathway cable installation, and street and alley duct crossing construction work;" and "No. 6294" for "pole erection, distribution line construction and extensions and rearranging present distribution lines for aerial circuits," the last mentioned of which (No. 6294) had also been made with plaintiff. Prior to the expiration of the extended time of said four contracts, said Commissioner, on June 25, 1919, reported that two of said four contracts, viz. Nos. 6300 and 6264, would not be completed in accordance with the dates stipulated for completion, and recommended that an order be passed extending the time of these two contracts to December 31, 1919. This recommendation was followed and the time of completion of said two contracts was extended by the City Council, by order entered July 21, 1919. It is to be noted that the contract sued upon, No. 6266, was not referred to by the Commissioner in his report, and no reference to it is embodied in the order passed by the City Council on July 21, 1919. No extension of time beyond July 1, 1919, was asked of plaintiff by the City of Chicago on the contract sued upon, but the City permitted the same to lapse.

As early as March 11, 1919, plaintiff, by its president, F. F. Cummings, wrote to the Department of Gas and Electricity of the City, calling attention to the extension of time which had been granted on the contract sued upon until July 1, 1919, and stating: "I wish to call your attention to the fact that we must receive plans from which contracts are to be done, at once, in order to complete all of the work specified therein as of July 1, 1919." Again, on March 21, 1919, plaintiff wrote said Department, referring to the former letter and stating: "Will you please advise us when

we may expect to receive plans covering this work, so that we can make the necessary arrangements to complete this contract in its entirety within the time allowed by the City Council, or as of July 1, 1919; as you know, we have received no plans on this contract to date, and it will require a large organization to complete the work by July 1st should we receive the plans at once." Again, on May 26, 1919, plaintiff wrote said Department asking for plans, also asking for cutting lengths for the cable where the conduits had been installed, and stating: "we have the approximate quantities stated in our contract on order with the manufacturer as of September 7, 1918, and they are after us continually to furnish them the cutting lengths." Again, on June 16, 1919, plaintiff wrote said Department, sending a copy of the letter of May 26th, and stating: "Will you kindly favor us with a reply containing the information asked, so that we may proceed with the contract." Apparently no replies were received to these letters. On June 28, 1919, W. F. Cummings, had a conversation with E. C. Keith, Commissioner of Gas and Electricity of the City, at which Keith told Cummings that he had some plans for the work under the contract, and the latter told the former to "send them over," but they were not sent. It further appears from plaintiff's evidence that up to the time of the expiration of the contract, as extended, July 1, 1919, it held itself in readiness to begin work under the contract, and had the force of men and equipment necessary to do the work, as well as the financial means. It could not, however, proceed further with the work without the plans which were never received. The contract fixed certain unit prices for doing the work to be performed by plaintiff, and W. F. Cummings testified what the cost of performance would have been on June 30, 1919, for each item of work provided for by the principal part of the contract, and what plaintiff's profits would have been

on each item if it had been permitted to perform, and that the total amount of profit would have been \$38,762.90. Plaintiff claimed no damages under the clause of the contract providing for the pulling out of cable as the Commissioner might direct.

The City did not call any witnesses. It, however, attempted to introduce a copy of a letter, dated August 8, 1910, after the contract had expired, and written by the Commissioner to Mr. Cummings, in which the former referred to certain alleged conversations had between them, used language suggesting that he considered the contract to be still in force, and called upon plaintiff to state its intentions with reference to the performing of the contract. This letter was properly excluded by the court. The testimony of plaintiff's president, as to the breach of the contract by the City and as to the cost of performance and plaintiff's profits had it been permitted to perform, was not contradicted. Counsel for the city stated that it had been his intention to call the Commissioner as a witness for the City with reference to said letter of August 8th, but that inasmuch as the court had ruled the letter incompetent, he would be compelled to rest his case on the record. Plaintiff's president further testified that plaintiff did certain work, consisting of hauling and pulling out certain old cables and re-installing the same in the South Chicago District, a separate and distinct district from the "O" district in question; that under another work order it spliced certain cables also in said South Chicago District; that it received \$6000 from the City for said work in said South Chicago District; but that it did not get any work orders for the work in the "O" district, provided for in the contract.

Many errors are here assigned by the City, but those argued and relied upon concern the instructions given by the court, the refusal of the court to instruct the jury to find the issues for the City, alleged errors in rulings on evidence, and the

failure of the court to require a remittitur of \$4000, the amount plaintiff received for work done in said South Chicago District. We do not think that the court committed any reversible error in the rulings on evidence or, under the facts in evidence, in giving any of the instructions complained of.

As to the refusal of the court to instruct the jury to find the issues for the City we think that the court's action was right. By the terms of the contract the City was under obligation to furnish plans to plaintiff. The work required could not be performed without them. The City failed to furnish such plans, notwithstanding plaintiff's repeated demands therefor. Plaintiff stood ready at all times and was able financially to do the work required. The City by its actions breached the contract as of July 1, 1917, when the time of performance expired. The failure of the City to furnish the plans was as much a breach as if plaintiff had been ordered to do no work under, or had been otherwise prevented from performing, the contract. These views are sustained by the following cases; Blanchard v. Blackstone, 102 Mass. 343, 347; Chaletron v. Board of Education, 344 Ill. 470, 476; Batts v. Bentley, 1 Deam. 410, 412; United States v. Speed, 5 Wall. 77, 84; Hinckley v. Pittsburgh Steel Co., 121 U.S. 264. And the profits that plaintiff would have made, if it had been permitted to perform the contract, constitute the proper measure of damages in such a case as this, and the amount is determined by ascertaining the difference between the contract price and what it would have cost to do the work at the time of the breach of the contract. (Masterton v. Mayor of Brooklyn, 7 Hill, N. Y. 61, 66; Chaletron v. Board of Education, 344 Ill. 470, 476; Hayes v. Wagner, 320 Ill. 286, 292; Kingsman & Co. v. Hanna Wagon Co., 176 Ill. 545, 553; Hinckley v. Pittsburgh Steel Co., supra.) In the present case the amount of the verdict

is the exact amount of the profits plaintiff would have made, computed in the manner mentioned, had it been allowed to perform, as shown by the uncontradicted evidence of plaintiff's president.

And we do not think, in view of the terms of the contract and the facts in evidence, that the court erred in refusing to require a restitution of \$1000 on the amount of the verdict. This amount was voluntarily paid by the City for work done by plaintiff, under special orders of the Commissioner, outside of the "O" District, and of a class different from that here in question.

Finding no error in the record, the judgment of the Circuit Court is affirmed.

AFFIRMED.

Barnes, P. J., and Merrill, J., concur.

It was stated that the parties definitely were not
separated in the manner mentioned, but it was stated in further
evidence by the prosecution witness at plaintiff's residence
and on the day before, in view of the time at the
residence and the time in evidence, that the same would be
known to plaintiff a separation at about the same time of the
plaintiff. This would be a material fact in the case for the
jury to decide. There is no question of the defendant's
guilt of the offense, and at a time defendant was not
with the plaintiff.

Nothing was stated in the record, and nothing in the
evidence is to the contrary.

THE COURT:

Verdict for the defendant, \$10,000.

153 - 27629

CARROLL C. DIAMOND,
Appellee.

vs.

CHECKER TAXI COMPANY,
a corporation,
Appellant.

226 I.A. 661

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is a tort action for damages to plaintiff's automobile occasioned by its being run into by a taxi-cab of defendant on the evening of November 24, 1921. The proof showed that the automobile was standing, facing south, on Michigan avenue, close to the curb and near 53rd street, in the city of Chicago, and that defendant's taxi-cab, being excessively driven in a southerly direction on Michigan avenue, ran into the rear end of the automobile and greatly damaged it. The court found the defendant guilty and assessed plaintiff's damages at \$184, upon which finding the judgment appealed from was entered.

Plaintiff and several other witnesses testified in his behalf. Defendant did not introduce any evidence. The only point urged for a reversal of the judgment is that plaintiff's evidence, as to repairs made on the automobile after the collision, does not sufficiently show that they were made necessary by reason thereof. We will not review the evidence in detail bearing upon this point. It is sufficient to say that in our opinion the testimony of the several witnesses discloses that the repairs, as made, were necessary because of the injuries to the automobile received in the collision, and that the finding and judgment are amply supported by the evidence. The facts disclosed in the present record are different from

those in Coyne v. Cleveland, Cincinnati, Chicago & St. Louis
Ry. Co., 206 Ill. App., 425, relied upon by defendant's
counsel.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Merrill, J., concur.

Shaw v. Rumsford, Cincinnati, Ohio, 1891

118 U.S. 575, 4 S.Ct. 350, 31 L.Ed. 248

Shaw, Appellant.

The judgment of the Municipal Court is affirmed.

Reversed.

Shaw v. Rumsford, Cincinnati, Ohio, 1891

163 - 27639

OSCAR JOHNSON, Appellee.

vs.

JOHN BRENNAN, Appellant.

226 I.A. 661

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$250 rendered by the Municipal Court of Chicago against defendant in a fourth class tort action, tried before the court without a jury.

In his amended statement of claim plaintiff alleged that during the month of May, 1922, he delivered to defendant, at his request and for his accommodation, a Schuttler lumber wagon of the value of \$300; and that although often requested defendant has failed and refused to return the wagon and has converted it to his own use. Defendant in his affidavit of merits denied the delivery of the wagon to him or for his accommodation, or that he had converted the same to his own use, and alleged that a certain wagon was left or abandoned by plaintiff in defendant's yard and was afterwards removed by plaintiff or by some other person, and that said last mentioned wagon was old, out of repair and practically worthless.

The testimony of plaintiff's witnesses tended to show that plaintiff was in the teaming business and defendant in the wholesale lumber business in Chicago; that for several years prior to May, 1922, the parties had had business relations one with the other; that on May 29th or 30th, 1922, defendant telephoned plaintiff, saying that he had a car of lumber in his yard, a part of which lumber he was desirous of delivering to a certain place in the city, and requesting the loan of a

100.4122

This is an appeal from a judgment of the District Court of the United States for the District of Columbia, rendered in a case captioned as above.

In his amended statement of claim plaintiff alleged that during the month of May, 1935, he delivered to defendant, at his request and for his accommodation, a certain motor wagon of the value of \$300; and that although after receipt defendant was failed and refused to return the wagon and has converted it to his own use. Defendant in his affidavit of denial denied the delivery of the wagon to him or for his accommodation, or that he had converted the same to his own use, and alleged that a certain wagon was left at defendant's place in defendant's yard and was afterwards removed by plaintiff or by some other person, and that said last mentioned wagon was sold out of repair and practically worthless.

The testimony of plaintiff's witnesses tended to show that plaintiff was in the laundry business and defendant in the wholesale motor business in Chicago; that for several years prior to May, 1935, the parties had had business relations and also the court, that on May 20, 1935, defendant's

testimony plaintiff, saying that he had a car of number in his yard, a part of which number he was desirous of delivering

wagon; that plaintiff, by one of his teamsters, delivered the wagon in question to defendant at the latter's yard; that thereafter plaintiff often requested the return of the wagon; that at the time of making one of said requests defendant said that he had allowed a third party to take the wagon for his accommodation, that he would see that it was returned to plaintiff but that it was never returned; that plaintiff purchased the wagon in April, 1920, and paid \$250 for it; and that its fair market value when delivered to defendant, in the condition it was then in, was \$300. Defendant testified in substance that an old wagon of the value of about \$15 was left by plaintiff, for his convenience, in defendant's yard, and that one Kearney, who claimed he had purchased it of plaintiff, took it out of defendant's yard without defendant's consent. Kearney testified that sometime in 1920 he purchased a wagon of plaintiff for \$50, that somehow it got in defendant's yard and that one of his (Kearney's) teamsters took it away from defendant's yard. There was evidence tending to show that the wagon concerning which defendant and Kearney testified was not the wagon in question.

Counsel for defendant here contends that the finding is manifestly against the weight of the evidence. We do not think so. On the contrary we think that the evidence is amply sufficient to show a conversion by defendant of the wagon, of the value of at least \$250. Much of the printed argument of defendant's counsel is taken up in a discussion of the law relating to bailments. It is argued that plaintiff was to have the hauling of the lumber and that there was a bailment for the mutual benefit of the parties, and that, hence, defendant was responsible only for gross neglect in caring for the wagon, which is not shown by the evidence. If defendant be considered as a bailee of the wagon, it is not disputed that it was

...the wagon; that plaintiff, by one of his servants, delivered the wagon in question to defendant at the latter's yard; that after plaintiff often requested the return of the wagon; that at the time of making one of said requests defendant said that he had allowed a third party to take the wagon for his accommodation, that he would see that it was returned to plaintiff but that it was never returned; that plaintiff purchased the wagon in April, 1920, and paid \$200 for it; that the said wagon when delivered to defendant, in the condition it was then in, was \$250. Defendant testified in evidence that an old wagon of the value of about \$15 was left by plaintiff, for his convenience, in defendant's yard, and that the plaintiff, who claimed he had purchased it of plaintiff, had it not at defendant's yard without plaintiff's consent. Defendant testified that sometime in 1920 he purchased a wagon of plaintiff for \$50, that sometime in 1920 in defendant's yard and that one of his (defendant's) servants took it away from defendant's yard. There was evidence tending to show that the wagon concerning which plaintiff and defendant testified was not the same as the wagon which defendant here contends that the finding is manifestly against the weight of the evidence. We do not think so. On the contrary we think that the evidence is very sufficient to show a conversation by defendant at the wagon, at the value of at least \$250. Much of the printed argument of defendant's counsel is taken up in a discussion of the law relating to bailments. It is argued that plaintiff was to have the handling of the wagon and that there was a bailment for the mutual benefit of the parties, and that, defendant was responsible only for gross neglect in caring for the wagon, which is not shown by the evidence. It defendant be considered as a bailee of the wagon, it is not disputed that it was

delivered to him, that he permitted it to get out of his possession, and that it was never returned to plaintiff. Under such circumstances the law presumes that defendant is guilty of negligence and imposes on him the burden of showing that he exercised the degree of care required by the nature of the bailment. Punkhouser v. Lagner, 58 Ill. 59, 60; Cumins v. Wood, 44 Ill. 416, 421; Schaefer v. Safety Deposit Co., 261 Ill. 43, 51.) This burden defendant did not maintain.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Morrill, J., concur.

delivered to him, that he admitted it in his own mind
consequently, and that it was his intention to claim it.
He also said that the law firm of [redacted] was
fully authorized and empowered to act in his behalf in
the matter of the [redacted] and that he was
not in possession of any of the [redacted] or the [redacted].
[redacted] v. [redacted] 22 Ill. 2d 30, 31; [redacted]
v. [redacted] 22 Ill. 2d 31, 32; [redacted] v. [redacted] 22 Ill. 2d 32, 33.
[redacted] v. [redacted] 22 Ill. 2d 33, 34.
The judgment of the [redacted] court is affirmed.

WITNESSES:

James L. [redacted] 1st Deputy.

176 - 27652

LEVANT AMERICAN COMMERCIAL
COMPANY, a corporation,
Appellant.

vs.

MINNEAPOLIS MALT AND GRAIN
COMPANY, a corporation,
Appellee.

223 I.A. 661

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an action in assumpsit, commenced in the Circuit Court of Cook County, on July 29, 1919, to recover damages for failure of defendant to deliver to plaintiff 200 tons of coast malt, the same being a portion of 400 tons which defendant, by written agreement signed by the parties and dated August 6, 1917, contracted to sell to plaintiff. At the close of plaintiff's evidence the court directed the jury to return a verdict in favor of defendant, which they did, and judgment was entered against plaintiff for costs on December 2, 1921. It is sought by this appeal to reverse the judgment, and the main question for our determination is whether the court erred in not allowing the issues to be passed upon by the jury.

Plaintiff's declaration consists of four special counts, each setting forth the contract in hæc verba or in substance, and the common counts. Defendant filed a plea of the general issue and notice of certain special defenses relating to the alleged inability of defendant to deliver said 200 tons of malt by reason of certain alleged governmental restrictions.

By the contract defendant agreed to sell to plaintiff, and the latter agreed to buy, 400 tons of coast malt at the price of 1.65 per bushel of 34 pounds. The malt was to

be delivered "f.o.b. New York," packed in "double burlap double paper lined" bags. The terms were: "Cash against documents; all unpaid matured bills shall be subject to sight draft and 6% interest until paid." Under the heading "Shipments" it was provided that "the buyer shall order the malt shipped in bags, between now 191- and October 31st, 1917." By a provision on the face of the contract the stipulations on the back were made a part of the contract, and one of them was as follows:

"If any portion of the malt shall not have been ordered out by the buyer at the expiration of the period for shipments, this contract may be extended at the option of the seller, and the seller shall be entitled to charge the buyer with carrying charges of one cent per bushel for each month, or fraction thereof, that such malt is carried after said expiration of the shipping period, which charges the buyer agrees to pay."

The evidence introduced by plaintiff disclosed in substance the following: Plaintiff's main office was in New York City and defendant's in Chicago. Prior to the execution of the contract the parties had been doing business with each other for several years. During the years 1915 and 1916 plaintiff had several times purchased malt of defendant under somewhat similar contracts, which were negotiated and signed on behalf of defendant by one Fred J. Shalek, its salesman and agent, and afterwards approved by an officer of defendant. Certain controversies had arisen in relation to contracts executed in 1916, some of which were still unsettled, particularly a controversy over the sum of \$886.34, claimed by defendant for former storage charges. Prior to the expiration of the shipping period, October 31, 1917, mentioned in the contract in question, plaintiff had not ordered any of the 400 tons of malt. About November 18, 1917, plaintiff gave a written order to Fred J. Shalek, defendant's agent, directing defendant to ship 200 of the 400 tons to New York City, which order defendant shortly

thereafter received in Chicago. Under the provision on the back of the contract defendant then had the option of extending the contract, and, if it did extend it, of being entitled to charge plaintiff "with carrying charges of one cent per bushel for each month, or fraction thereof, that such malt is carried after said expiration of the shipping period." Defendant exercised its said option and extended the contract by shipping the 200 tons, so ordered, to New York City during the latter part of December, 1917, and early in January, 1918, and by sending to plaintiff prior thereto two bills for storage charges on the malt for the months of November and December, 1917, amounting at the rate of one cent per bushel to the sum of \$368.53, for each month. On December 12, 1917, plaintiff sent defendant a credit memorandum, stating that it had credited defendant's account in the sum of \$886.34, for the storage charges in dispute on said 1916 contracts. At that time plaintiff had an unsettled counter-claim against defendant of \$1670, arising also under said 1916 contracts, and concerning which the parties had had and were having considerable correspondence. About February 1, 1918, and about the time the 200 tons of malt were received in New York City, plaintiff paid defendant in full for said 200 tons, but did not pay defendant's said bills for storage charges for the months of November and December, 1917, on the contract in question, and evidently for the reason that on December 18, 1917, defendant had written plaintiff in part as follows: "We are willing to ship this malt (200 tons) according to your instructions, via the B. & O., but cannot make any allowances in freight or other New York charges. We will, however, waive all storage on this 200 tons of the contract. We have been under considerable expense, and must be under considerable expense in order to secure empty cars in which to load the malt, even to the B. & O. railroad. You

the contract received in Chicago. Under the provision in the
back of the contract defendant knew that the right of extending
the contract, and, if it was extended it, of being entitled to
extend plaintiff's contract without change of rate was not
for each month, as plaintiff stated, but each month it was
either said extension of the original contract. Defendant
extended the contract with option and extended the contract by extending
the contract, as stated, on New York City during the latter
part of December, 1917, and early in January, 1918, and by
extending to plaintiff's price through the date for extension of the
contract, and the date of extension was January, 1918.
Defendant at the rate of one cent per pound to the end of
January, 1918, for each month. On January 18, 1918, plaintiff said
defendant a credit memorandum, stating that it had credited
defendant's account in the sum of \$100.00, for the storage
charges in light on said date connected. At that time plaintiff
still had an unsettled contract claim against defendant of \$100.00,
which was paid to plaintiff, and defendant's
the parties had had and were having considerable correspondence.
That January 1, 1918, and about the time the 100 tons of wheat
were received in New York City, plaintiff paid defendant in 1918
the said 100 tons, but did not pay defendant's note \$100.00 for
storage charges for the wheat in warehouse and warehouse, 1917,
in the contract in question, and defendant for the reason that
on December 18, 1917, defendant had written plaintiff in New
York City, New York, as follows: "We are willing to pay you \$100.00
for the wheat in warehouse, the 100 tons of wheat
and the 100 tons in light in New York City."
However, we have all known on this date of the
contract. We have seen under considerable expense, and must be
in some considerable expense in order to secure empty cars in

are not familiar with the fact that there is a necessity to virtually buy empty cars in which to ship malt at this point
* * . we will do this, however, on condition that we receive your check for the amount of the credit for old storage bills."
On December 27, 1917, before the 300 tons of malt so ordered by plaintiff had been shipped by defendant on the contract as extended, plaintiff wrote defendant in part as follows:

We will insist upon your completing the contract of August 6th exactly to the letter, and hold you literally and actually responsible for the breach of it. You have agreed to bring this malt to New York, f.o.b., lighterage free, and unless you can show a governmental prohibition, you are not in the slightest relieved from your obligation, and what is more, you must carry this malt free of any storage or interest until the time it is possible for you to ship. In order to end this discussion, outside of the 200 tons that you are shipping, you can ship, same conditions, the balance of 200 tons in two lots of 100 tons each, marking one lot 'Laces, N.Y.' and the other 'M, N.Y.', in cars containing 25 tons each, if possible. We hold, for these last 200 tons, export licenses Nos. 1125656 for 100 tons, and 1125655 for 50 tons, as well as No. 1001343 for 200 tons, of which you can make proper use, if of any assistance to you."

On the day this letter was written, Fred J. Shalek, defendant's agent, was in New York City and leaving for Chicago, and plaintiff's officer, who wrote it, delivered it to Shalek with the request that he, upon his arrival in Chicago, deliver it to defendant. Shalek, in his deposition, testified that he delivered the letter about the day of its date at defendant's office in Chicago to W. F. Hales, president of defendant, and had a conversation with him at the time during which Hales said: "They had no right to claim anything; they did not order the malt out in the time they should have;" and that Hales "put the letter somewhere" and afterwards said that it "had been lost or misplaced." Defendant did not answer this letter. On January 30, 1918, and again on February 6th, plaintiff wrote defendant referring to its order to ship the remaining 200 tons of malt contained in said letter of December 27th, and repeated the

order. On February 11th, defendant, by said Hales, president, wrote plaintiff, acknowledging receipt of its letter of February 6th, and stating: "we received no order from you on December 27th to ship any malt; it would not have been possible under any circumstances to ship you this malt had such order been received, * * because no shipments of malt, either domestic or export, can be shipped without a license permit, which the consignee is obliged to secure." On February 18th, plaintiff wrote defendant, saying in part: "Our letter of December 27th authorizes you to ship the remaining 300 tons, and we have given you the marking and license numbers at that time; the U. & G. people were ready to accept said goods for Pier 21, East River, New York City." On February 13rd, defendant, again by said Hales, president, wrote plaintiff, asking for a copy of plaintiff's letter of December 27th, repeating the statement that the letter had never been received, saying that defendant's position would not have been changed even if the letter had been received, and concluding: "we do not wish you to construe this letter as signifying that we at this time recognize any obligations on account of said contract of August 6, 1917. This contract, as must hold, can no longer be recognized as in force and effect." This was the first definite statement received by plaintiff that defendant did not consider the contract in force. The unsworn statements in defendant's said letters, to the effect that plaintiff's letter of December 27th had never been received by it, are in direct contradiction to the undisputed testimony of Shalek, above mentioned. Subsequent to the receipt of defendant's letter of February 13rd, plaintiff in several letters urged performance of the contract on defendant's part by shipping the remaining 300 tons, which defendant did not ship, and thereafter the present action was commenced.

On the trial plaintiff introduced testimony showing the market price of coast malt in New York City during the latter part of December, 1917. The price named in the contract is \$1.65 per bushel. One of plaintiff's witnesses testified that the price there at that time was approximately \$1.70 per bushel, packed in ordinary single bags, but, if packed in double burlap double paper lined bags, as provided in the contract, the price would be from 8 to 17 cents more per bushel. This is from 15 to 22 cents per bushel more than the contract price. Another witness, called by plaintiff, put the market price at a much lower figure. Plaintiff offered to prove by the first named witness the market price of coast malt in New York City during the months of January, February and March, 1918, but the trial court would not allow this testimony to be admitted. Plaintiff's offer showed that said price was steadily rising, and that on February 23, 1918, when defendant wrote plaintiff that the contract was no longer in force, said price was about \$2 per bushel.

After careful consideration of the present record and of the exhaustive printed briefs and arguments of respective counsel, we have reached the conclusion that the trial court erred in taking the case from the jury at the close of plaintiff's evidence, in entering the judgment appealed from, and in not admitting certain offered evidence relating to plaintiff's damages because of defendant's failure to ship the remaining 200 tons of malt under the contract.

Counsel for defendant, in support of the trial court's action first contends that plaintiff failed to sufficiently prove an extension of the contract by defendant after the expiration of the shipping period, October 31, 1917, mentioned therein. We think that a reasonable, though indefinite, extension of the contract was made by the acts of defendant, viz: (1) in billing of

In the trial plaintiff's testimony showed that the contract was made in New York City during the latter part of November, 1917. The price named in the contract is \$1.00 per bushel. One of plaintiff's witnesses testified that the price there at that time was approximately \$1.75 per bushel, packed in ordinary single bags, but it packed in double heavy double paper lined bags, as provided in the contract, the price would be from 2 to 3 cents more per bushel. This is from 2 to 3 cents per bushel more than the market price. The witness, called by plaintiff, put the market price at a much lower figure. Plaintiff offered to prove by the first named witness the market price at New York City during the month of January, February and March, 1918, but the trial court would not allow this testimony to be admitted. Plaintiff's offer showed that said price was steadily rising, and that on February 22, 1918, when defendant wrote plaintiff that the contract was no longer in force, said price was about \$2 per bushel.

After careful consideration of the present record and of the extensive printed briefs and arguments of respective counsel, we have reached the conclusion that the trial court erred in taking the case from the jury at the close of plaintiff's evidence. In reaching the judgment appealed from, and in not admitting evidence offered by plaintiff to establish the value of defendant's failure to ship the remaining 200 tons of wheat under the contract.

Counsel for defendant, in support of the trial court's action first contends that plaintiff failed to satisfactorily prove an extension of the contract by defendant after the expiration of the original period, January 31, 1918, and secondly, that a reasonable, though indefinite, extension of the contract was made by the acts of defendant, viz: (1) in filling or

plaintiff storage charges for the months of November and December, 1917, in accordance with the provision of the contract on the back thereof, and (2) in shipping the first 300 tons of malt during the latter part of December, 1917, and early in January, 1918, and when said 300 tons arrived in New York about February 1, 1918, in collecting of plaintiff the amount due on said 300 tons. We also think that plaintiff was fully within its rights in ordering, on December 27, 1917, that the balance of the 400 tons be shipped to it. Plaintiff's evidence sufficiently disclosed that defendant received its letter, ordering the shipment of said balance, before all of the original 300 tons had been shipped by defendant, and more than a month before said original 300 tons reached plaintiff in New York ^{and} were paid for.

Counsel for defendant also contends that plaintiff was itself in default under the contract by reason of its failure to pay defendant's bills for storage charges for the months of November and December, 1917. It appears that defendant in its letter of December 18th, waived these charges. A careful reading of that letter, and of other of defendant's letters, discloses that such waiver was not made upon condition, as urged.

Counsel for defendant further contends that plaintiff "failed to prove proper elements to measure its damages." Counsel for plaintiff, on the other hand, contend that one of the serious errors of the trial court was that it limited plaintiff to proof of its damages as of December 27, 1917. It was contended by defendant in the trial court that, if at the time plaintiff by its letter of December 27th ordered the balance of the malt to be shipped defendant was under obligation to accept that order, the testimony of Shalak disclosed that defendant about that date repudiated its obligation, when its president told Shalak that plaintiff "had no right to claim anything," etc.; in other words, that the breach of the contract, if any there was on defendant's

Plaintiff's evidence shows that the amount of damages was \$100,000. In accordance with the provision of the contract on the 1st of January, 1914, and (2) in shipping the first 500 tons of rails during the latter part of December, 1914, and early in January, 1915, and when said 500 tons arrived in New York about February 1, 1915, in collection of plaintiff the amount was on said 500 tons. It also shows that plaintiff was duly advised the rights to covering on December 27, 1914, that the balance of the 500 tons be shipped to it. Plaintiff's evidence sufficiently discloses that defendant received the letter, ordering the shipment of said balance, before all of the original 500 tons had been shipped by defendant, and more than a month before said original 500 tons reached plaintiff in New York ^{and} were paid for.

Conceding the defendant also ordered that plaintiff's credit in debit under the contract by reason of the failure to pay defendant's bill for storage charges for the months of November and December, 1914. It appears that defendant in its letter of December 19th, waived these charges. A careful reading of that letter, and of other of defendant's letters, discloses that such waiver was not made upon condition, as alleged.

Conceding for defendant further contends that plaintiff failed to prove proper elements to measure its damages. Conceding the plaintiff, on the other hand, contend that one of the serious errors of the trial court was that it limited plaintiff to proof of its damages as of December 27, 1914. It was contended by defendant in the trial court that, at the time plaintiff by its letter of December 27th ordered the balance of the rails to be shipped defendant was under obligation to accept such order. The testimony of which discloses that defendant about that date repudiated its obligation, when its president told witness that plaintiff was as free to ship anywhere, etc. in other words, that the balance of the rails was to be shipped to New York.

part, occurred then. Counsel for defendant urges the same point here. We cannot agree with him. We think that the evidence shows that defendant did not definitely breach the contract until February 23, 1918, when it wrote plaintiff that the contract "can no longer be recognized as in force and effect." And we think that under the evidence the damages should be measured as of the time and place of performance. (Long v. Conklin, 71 Ill. 32; Casen v. De Stieger Glass Co., 106 Ill. 185, 191; Delaware and Hudson Canal Co. v. Mitchell, 93 Ill. App. 577, 580.) In Summers v. Hibbard & Co., 153 Ill. 103, 111, it is said: "If delivery is postponed by agreement between the parties, the measure of damages is the difference between the contract price and the market price at the time the article is deliverable by the subsequent agreement, and where the time of delivery is postponed indefinitely, the measure of damages is the difference between the contract price and the market value at a reasonable time after demanding performance." (See, also, Haringer v. Imperial Cotton Milling Co., 164 Ill. App. 467, 468; Northwestern Iron & Metal Co. v. Hirsch, 94 Ill. App. 579, 582.) Plaintiff "demanded performance," i.e., demanded the shipment of the balance of the malt under the contract on December 27, 1917, and, not getting any reply to its letter of that date, repeated its order to ship in letters dated respectively January 30, and February 6, 1918, which last mentioned letters were admittedly received by defendant. We think it was for the jury to say when defendant actually received the demand from plaintiff for the shipment of the balance of the malt, and what was a reasonable time thereafter under all the existing facts and circumstances for defendant to deliver said balance, "f.o.b. New York." (Adams v. Pendarvis, 217 Ill. App. 535, 539; Ullsperger v. Meyer, 217 Ill. 262, 267.) There was evidence showing that under average conditions it took from 10 days to two weeks for malt to reach

[illegible]

New York after its shipment from Chicago and that some additional time would necessarily be consumed in getting freight cars and loading the malt therein, but that during the latter part of the year 1917, and the early part of 1918, conditions were unusual, because of war conditions, and railroads were clogged with freight, and shipments moved under great handicaps and were greatly delayed. Although the original 300 tons were ordered under the contract about November 15, 1917, they were not shipped until the last of December, 1917, and early in January, 1918, and did not arrive in New York until about February 1, 1918. Not until plaintiff received defendant's letter of February 23, 1918, was it advised that defendant had repudiated the contract. Before that time it would not have been authorized to go into the market and buy other malt. Up to that time it had a right to assume, particularly in view of the prior dealings and the prior correspondence between the parties, that defendant would ultimately deliver the balance of the malt. We are of the opinion that the trial court erred in limiting plaintiff to proof of the market price of the malt, as specified in the contract, in New York, as of December 19, 1917, and in refusing to allow evidence as to what that market price was on different days in the months of January, February and March, 1918. With such evidence admitted it would have been for the jury, in estimating plaintiff's damages if any, to determine, under all the evidence and under proper instructions, what was the market price in New York at a "reasonable time" after plaintiff demanded the shipment of the balance of the malt.

For the reasons indicated the judgment of the Circuit Court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Barnes, P. J., and Morrill, J., concur.

358 - 27316

EDWARD A. ROBERTSON,

Appellee.

vs.

CHICAGO CITY RAILWAY COMPANY
and CHICAGO RAILWAYS COMPANY,
Appellants.

126256
226 I.A. 661

APPEAL FROM

SUPERIOR COURT.

COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court of Cook County against appellants, who were defendants in the court below, in an action to recover damages for personal injuries sustained by appellee and for damages to his automobile as the result of a collision between said automobile and a street car operated by defendants. There was a jury trial, resulting in a verdict in favor of appellee for \$5,000, from which \$2,000 was remitted. Thereupon motions for a new trial and in arrest of judgment were denied and judgment was entered for \$3,000.

The collision occurred shortly after midnight on June 23, 1917, at or near the southeast corner of Drexel boulevard and forty-seventh street in Chicago. Drexel boulevard is a wide thoroughfare running north and south. It has two driveways, each forty feet in width, on its east and west side respectively, with a parkway between them ninety feet in width. The parkway is an ornamental ground containing trees, shrubbery, flowers, expanses of lawn and one small policeman's box about five feet square. Forty-seventh street runs east and west. The roadway is about forty feet wide and contains two street railway tracks, the south one being used by east bound cars and the north by west bound cars.

Just prior to the collision, plaintiff was driving his automobile in a northerly direction on the east side of the east

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driveway of Drexel boulevard about four feet from the east curb thereof. The automobile was a Buick roadster containing one seat. Plaintiff was driving the machine and occupied the left end of the seat. He was accompanied by three ladies, whom plaintiff was taking home from a social affair attended by all of them. Two of the ladies occupied the portion of the seat to the right of the driver and the third was seated cross-wise on the lap of the lady sitting at the right end of the seat. Plaintiff had stopped his machine at a point about 150 feet south of Forty-seventh street for the purpose of adjusting the top, which was left down, and thereafter proceeded on his way at a speed of from twelve to fourteen miles an hour. At this time the street car in question was moving in an easterly direction on the south track of Forty-seventh street. It had come to a full stop on the west side of Drexel boulevard and thereafter proceeded across the boulevard. The street car carried a headlight, which was lighted, and was also brilliantly illuminated with electric lights on the inside.

According to plaintiff's testimony, the shrubbery and trees on the parkway were so dense as to obstruct his view in a westerly direction along Forty-seventh street and prevent him from seeing the approaching car until he was about twelve feet south of the south car track. If plaintiff looked in the direction of the car as he stated, it is impossible to understand why he failed to see the car earlier. If he was reasonably alert the noise of the approaching car should have been apparent to him. The distance between the north line of the parkway and the south rail of the car track was approximately twenty-five feet. This space was occupied by the paved roadway of Forty-seventh street and the cross-walk on the south side thereof. There were no trees or shrubbery upon it. When plaintiff was at this distance from

highway of twenty minutes about four feet from the road edge
 there. The automobile was a light-colored sedan and
 east. Plaintiff was driving the machine and occupied the left
 end of the seat. He was accompanied by three ladies, whom
 Plaintiff was taking home from a social affair attended by all
 of them. Two of the ladies occupied the portion of the seat to
 the right of the driver and the third was seated cross-wise on
 the lap of the lady sitting at the right end of the seat. Plaintiff
 still had stopped his machine at a point about two feet south of
 forty-seventh street for the purpose of adjusting the lamp, which
 was left down, and thereafter proceeded on his way at a speed
 of from twelve to thirteen miles an hour. At this time the
 street car in question was moving in an easterly direction on
 the north side of Forty-seventh street. It had come to a full
 stop on the west side at Street Railway and thereafter proceeded
 across the boulevard. The street car carried a headlight, which
 was lighted, and was also brilliantly illuminated with electric
 lights on the inside.
 Plaintiff is Plaintiff's testimony. The testimony was
 given on the highway where he claims to be standing and view in a
 westerly direction along Forty-seventh street and prevent him from
 seeing the approaching car until he was about twelve feet south
 of the south end track. If Plaintiff looked in the direction of
 the car as he stated, it is impossible to understand why he failed
 to see the car earlier. If he was reasonably alert the noise of
 the approaching car should have been apparent to him. The
 distance between the north line of the highway and the south rail
 of the street car was approximately twenty-five feet. This space
 was occupied by the paved roadway of Street Railway street and the
 cross-walk on the south side thereof. There were no trees or
 shrubbery near it. When Plaintiff was at this distance from

the south track, so conspicuous an object as the brilliantly lighted car was easily within his range of vision. The car was near at hand and in plain sight, with nothing obstructing plaintiff's view. Therefore his statement that he looked and did not see the car must be rejected. If plaintiff looked, it must have been for the purpose of seeing. If he had exercised his power of vision, he must have seen the approaching car. Any other conclusion would be an absurdity. Livingston v. C. & N. Y. Co., 170 Ill. App. 344; C. & N. Y. Co. v. De Freitas, 109 id. 104; Brown v. C. & N. Y. Co., 155 id. 434. If he had been reasonably alert, the noise of the car would have been apparent to him. The conclusion is unavoidable that plaintiff was guilty of negligence in not stopping his automobile, as he could easily have done, in order to avoid the collision. Davis v. C. & N. Y. Co., 215 Ill. App. 636; Griffith v. Same, 323 id. 625. Plaintiff was familiar with the neighborhood and knew that there were street cars running on Forty-seventh street.

Plaintiff further testified that he made a quick turn of his car to the right in order to avoid a collision with the street car; that he did not see the street car just at the moment of the collision but that the street car was behind him and that he was then travelling in an easterly direction on Forty-seventh street, with the north or left side of his automobile directly in front of and in line with the south or right side of the street car; that his left rear wheel was over the south rail. According to his version of the affair, the street car, while moving at an excessive and dangerous rate of speed, struck his automobile, knocking off the left rear wheel and otherwise damaging it. All four of its occupants were thrown from the automobile and injured to some extent. Plaintiff's testimony as to the circumstances surrounding the accident is corroborated by that of

Mrs. Lampe, the lady who was sitting cross-wise upon the lap of one of the other occupants of the automobile and who claims to have seen the street car approach and strike the rear end of the automobile. On the other hand, four witnesses - the motorman, conductor and two passengers - testified explicitly that the automobile struck the south side of the street car at about its center, breaking the air tank on the street car. The testimony of these witnesses is strongly corroborated by the physical appearance of the street car as shown by photographs taken immediately after the accident. There were no marks on the front of the car or other indications that it had been in collision with any object in front of it, while numerous scratches, dents and broken parts near the center of the south side of the car show conclusively that it had been struck violently at that point. The conclusion seems irresistible that plaintiff's automobile in turning easterly on Forty-seventh street skidded, as plaintiff stated, on the pavement, which was damp and slippery from a drizzling rain that had been falling, so that its rear wheel and side came into violent contact with the right side of the street car.

Under either theory of the case, the accident could have been avoided with the exercise of ordinary care on the part of plaintiff. Carden v. Chicago Ry. Co., 210 Ill. App. 155; Hedmark v. Chicago Ry. Co., 192 id. 334.

The only claim made by appellee that the street car was operated negligently is based upon the charge that it was being run at an excessive and dangerous rate of speed. The contrary is shown by the great weight of the evidence. The only evidence upon this subject on behalf of plaintiff was his own statement

that the car was running at a speed of twenty miles an hour. If his narrative as to the circumstances surrounding the accident is to be accepted as true, he was in no position to judge of the speed of the car. It had come to a full stop on the west line of Drexel boulevard, and the statements of all the other witnesses, four in number, who testified on the subject, indicate that it was running at an ordinary rate of speed, probably six or seven miles an hour. There is nothing in the record to justify the conclusion that the street car was running at a dangerous rate of speed.

The judgment must be reversed for the reason that the evidence shows no negligence on the part of defendant, and in our opinion conclusively establishes that plaintiff was guilty of negligence which proximately contributed to the accident. On these points the verdict was manifestly against the weight of the evidence.

The judgment of the Superior Court is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Barnes, P.J., and Gridley, J., concur.

that the day was passing in a kind of twilight as it were.
 If the narrative be by the circumstance concerning the condition
 in to be regarded as true, he was in no position to judge of the
 speed of the car. It was then in a fair way on the road line
 of travel, however, and the statement of this was made in the
 fact is correct, and further on the subject, however, that it was
 possible to be satisfied with the speed, possibly also to have
 rights as such. There is nothing in the record to justify the
 conclusion that the record was not correct as a statement of the
 of speed.

The judgment was in favor of the car owner, that
 the evidence shows the negligence on the part of defendant, and
 in the opinion of the court, defendant's negligence was the cause
 of plaintiff's injury, and defendant is liable to the plaintiff for
 the amount of the injury and the expenses incurred by the plaintiff in the
 suit.

The judgment of the court is affirmed with
 costs of suit.

RECORDED WITH CLERK OF COURT

RECORDED WITH CLERK OF COURT

352 - 27318

FINDING OF FACTS.

The court finds as ultimate facts in this case that the defendants were not guilty of negligence in operating the street car in question at or just before the accident and that plaintiff was guilty of negligence which proximately contributed to the accident.

THE STATE OF TEXAS

THE STATE OF TEXAS, ss. I, the undersigned, Clerk of the County of ...

do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the County of ... and that said original was duly authenticated and recorded in the records of the County of ...

383 - 27341

FOREMAN BROS. BANKING CO.,
guardian of the estate of
John Cunningham, a minor,

Appellee,

vs.

CONSUMERS COMPANY,
a corporation,

Appellant.

226 I.A. 662

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE MCNEILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County awarding damages for personal injuries sustained by John Cunningham as the result of an accident alleged to have been due to defendant's negligence. There was a trial by jury, resulting in a verdict for \$95,000, upon which judgment was entered after motions for a new trial and in arrest of judgment had been denied. The declaration charged defendant with negligence in the management and operation of a certain automobile truck which ran over plaintiff's ward and with reckless, wanton and wilful conduct in the management, control and operation of the truck as it passed through a crowd of persons, of which plaintiff's ward was one, all of whom were lawfully walking upon the street where the accident occurred. There was a plea of the general issue.

The accident occurred on Racine avenue about twenty-five feet south of Forty-fifth street in Chicago, shortly after 5:30 o'clock in the afternoon of September 5, 1918. Racine avenue is a north and south street intersected at right angles by Forty-fifth street. In the block between Forty-fifth and Forty-sixth streets it is about twenty feet in width. The roadway is paved with brick. Outside of the pavement on each

side of the street there are switch tracks, on which cars were standing at the time of the accident. There is no sidewalk on either side of the street. On the day of the accident plaintiff's ward was about fifteen and one-half years of age. He was employed in a box factory at the southwest corner of Forty-fourth street and Racine avenue. The territory surrounding the scene of the accident is included within the Union Stock Yards. The working day in the box factory and in many other industrial establishments in the vicinity closes at 5:30 o'clock in the afternoon. At that time the employees in these establishments, numbering thousands of persons, leave their places of employment and pass along Racine avenue in dense crowds. The evidence shows that at the time of the accident the street was closely packed with people, most of whom were moving southward. The crowd filled the entire roadway between the switch tracks.

Just before the accident the automobile truck in question had been delivering sand at the box factory where Cunningham worked. After completing the delivery it had proceeded from the rear of the factory in Racine avenue and went southward along that street at a uniform rate of speed, which is variously stated by different witnesses to have been from six to fifteen miles an hour. There is evidence showing that it pursued a zigzag course through the crowd in order to avoid holes and other obstructions in the street, but the existence of these holes is denied by other testimony. The truck had a chute protruding from the right hand side. As the truck passed through the crowd without slackening its speed, plaintiff's ward was struck by this chute, thrown to the ground and the wheel of the truck passed over him, breaking his right leg.

It is contended by appellant that the evidence was not sufficient to establish the fact that there was negligence on the

part of plaintiff in operating the truck. This was a question for the jury to determine. The verdict was not contrary to the manifest weight of the evidence, and therefore cannot be disturbed. There is no claim of contributory negligence on the part of the person injured.

The only error urged on the part of the court in giving or refusing instructions is based upon the court's refusal to instruct the jury to find defendant not guilty under the seventh amended count of the declaration, which charged that defendant recklessly, wilfully and wantonly operated its truck without keeping the same under proper control as it passed through the crowd upon the street. There was evidence in the record tending to sustain this charge and the court did not err in refusing to instruct the jury to find defendant not guilty in that respect. Waldron Haggart Co. v. King, 291 Ill. 472.

The principal contention upon the part of the appellant is that the verdict is grossly excessive, indicating that it was the result of passion, prejudice, misconception or undue sympathy on the part of the jury. The injury involved in this case was of so serious a character as to require the amputation of the right leg below the knee. A number of operations were required and the injured person was under treatment by physicians and surgeons and unable to work for several years. Prior to the accident, he was earning \$10.00 a week and when he was able to work after recovering from the accident, he received \$4.00 a day, thereby indicating that he had suffered no loss of earning power as a result of the accident. While it is true that his physical activity will be impaired on account of his injury, there is nothing in the record to justify the conclusion that his earning power will be diminished thereby. Our attention has been called to a large number of cases cited by appellant indicating the attitude of reviewing courts as to the measure of damages considered fitting

and proper in the case of injuries of this character. These authorities sustain appellant's contention and show that \$10,000 has generally been considered the maximum amount proper to be awarded for the loss of a leg below the knee, even in instances where the earning power of the person injured was much greater than that of plaintiff's ward. On the other hand, it is urged by appellee that the money value of life and health is appreciating and that the purchasing power of money has depreciated during recent years. A number of cases have been cited showing that the courts of this and other states have been moved by this consideration in fixing the amount of damages awarded for personal injury, indicating that if \$10,000 was a fair compensation in value for such injuries as are involved herein at a time when the purchasing power of money was greater, a larger sum will now be required in view of the diminished purchasing power of money. We do not deem it necessary to review the numerous decisions which have been cited by appellant tending to show that the verdict was excessive. Practically all of these decisions were rendered at a time when the purchasing power of money was greater than at present. We are of the opinion that some consideration should be given to the present economic conditions which have been mentioned. It is the intention of the law to afford a fair compensation to one who has suffered a wrongful injury. Reese v. Chicago & N. W. Ry. Co., 221 Ill. app. 344; Waisville v. Ill. Cent. R. R. Co., 220 Ill. 113.

We are of the opinion that the verdict is excessive and must have been due, if not to passion or prejudice on the part of the jury, at least to a misconception of the measure of damages applicable to the case and undue sympathy for the person injured. We believe that a judgment of \$15,000 would be justified under the law, having in mind present economic conditions and

the decreased purchasing power of money.

The judgment of the Circuit Court will be affirmed provided the appellee remits the sum of \$10,000 within ten days. Otherwise the judgment will be reversed and the case remanded.

AFFIRMED ON REMITTITUM.

Barnes, F. J., and Gridley, J., concur.

The Government has decided to accept the

the Government of the United States will be willing

to consider the question of the use of the United States

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to consider the question of the use of the United States

394 - 27352

YETTA MILLER,
Appellee,

vs.

DAVID A. GOLDEN et al.,
On Appeal of BEVERLY A. CLARK
et al.,
Appellants.

226 I.A. 662

APPEAL FROM

CIRCUIT COURT.

COOK COUNTY.

MR. JUSTICE MONMILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court of Cook County entered February 10, 1921, foreclosing a trust deed in the nature of a mortgage. The decree in question found that there was due the complainant from certain defendants, including appellants, the sum of \$2425.91, with accrued interest amounting to \$596.97 and solicitors' fees of \$540, making an aggregate indebtedness of \$3563.88, and directed that in case of the failure of defendants to pay said indebtedness within two days, the mortgaged premises be sold to satisfy the decree. A reversal is sought upon the ground that the transaction involved was usurious and that the allowance for complainant's solicitors' fees was excessive.

The trust deed in question, dated April 18, 1916, was given to secure the payment of twenty-four notes, payable monthly, of which twenty-three were for the sum of \$50 each and the remaining note for \$1850, making a total indebtedness of \$2,000. The trust deed and notes were executed by the defendant Christopher C. Franklin, who then held the record title to the real estate, which he has since conveyed, but the notes were endorsed by Beverly A. Clark, the equitable owner of the land, and Pearl Clark, his wife. The complainant was the owner of notes numbered 12 to 24, both inclusive, for the principal amount of

\$2450, having purchased them on July 22, 1917, from one Rosenstone, the original owner of the notes.

It is claimed by appellants that in the course of the original transaction between them and Rosenstone, they delivered to him notes secured by said trust deed amounting to \$2650 in consideration of the payment by him to them of \$2017.18, the difference between the face amount of the notes and the amount paid, having been deducted by Rosenstone for cash disbursements made by him on behalf of the mortgagors and services alleged to have been rendered by him to them. The charge for services was \$435, which is claimed by appellants to have been excessive for the reason that a lender of money who reserves as compensation to himself for services in making the loan an amount in excess of legal interest on the loan is guilty of usury. Drayer v. Goldy, 62 Ill. App. 347; Jackson v. May, 28 id. 305. In the case at bar there is evidence tending to show that the services for which the charge of \$435 was made were rendered in connection with making necessary repairs and alterations upon the mortgaged premises in order to enable defendants to obtain a prior loan of \$6,000, which was a first lien thereon. The master found that there had been a full accounting between the parties.

The record shows that when complainant purchased the note in question the defendant Beverly A. Clark, the equitable owner of the mortgaged premises, was present, and in addition to oral assurances to the same effect, executed an affidavit in which he stated, in substance, that he was the owner of the real estate in question; that the title thereto was held by one Sarah Gill in trust for him; that there was due upon the notes and trust deed involved herein the sum of \$2450; that the trust deed in question was a valid lien upon the premises subject to a first mortgage for \$6,000, and that he had no defense of any kind.

1940, having received them on July 17, 1941, from the
Commission, the original owner of the notes.

It is claimed by appellants that in the course of the

entire transaction between them and appellees, they believed

to the notes covered by said check had amounted to \$100,000.

Commission of the payment by him to them of \$100,000, and

difference between the face amount of the notes and the amount

paid, having been retained by appellees for their own use.

more by him on behalf of the appellees and various others to

have been received by him as such. The check for \$100,000 was

paid, which is claimed by appellants to have been retained for the

purpose that a check of \$100,000 was received by appellees in

exchange for notes in which the face amount was \$100,000.

Legal interest on the notes is claimed to have been \$10,000.

NO. 111, 1941, 1942; 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950.

but there is evidence tending to show that the appellees have which

the check of \$100,000 was retained by appellees after

making necessary repairs and alterations upon the property.

appellees in order to enable appellees to obtain a proper loan of

\$100,000, which was a large sum then. The money loaned them

there had been a full accounting between the parties.

The money which they then borrowed was used for

work in making the defendant's property a block, the appellees

some of the mortgage payments, and interest, and in addition

it was necessary for the same effect, expended in addition to

what he paid, in addition, to pay the interest on the loan

which he received; that the \$100,000 was paid to him by

him to pay the loan; that there was also the \$100,000 and that

that interest thereon was \$10,000; that the \$100,000 was

paid him by a check of \$100,000, the appellees retained \$10,000

thereof for \$10,000, and that he had no interest in the \$10,000.

nature or description against the above mentioned trust deed or notes. Relying upon this affidavit, which was executed as an inducement to bring about the purchase of the notes by complainant, she then bought said notes and paid Hosenstone therefor the sum of \$2450.

Appellee contends that by reason of this affidavit the appellant Beverly A. Clark and those claiming under him are precluded from setting up the defense of usury, even if such usury existed, which is denied; that all of the essential elements of an estoppel existed and that the complainant at the time she purchased the securities was ignorant of any defense to the same and made her purchase relying upon Clark's affidavit. This estoppel was alleged by complainant in an amendment to the bill.

It is a general rule that where a person liable upon a note or other security represents to a prospective purchaser thereof that the obligation is valid and that there is no defense to it, he is estopped to resist payment in an action by such person who has taken the paper in reliance upon such representation. 21 C. J. 1143. This rule has been recognized repeatedly by the courts of this state. Heitner v. Linsenbarth, 90 Ill. App. 327; Casler v. Byers, 38 id. 128; Smith v. Newton, 38 Ill. 230; Kefner v. Dawson, 63 id. 403. We are of the opinion that the representations made by the defendant Clark, both orally and by his affidavit, constituted a waiver of the defense of usury.

The record contains over seven hundred pages and shows that there have been three separate references to a master in chancery, under each of which considerable testimony was taken and a report made; that there have been an equal number of hearings upon such reports and exceptions thereto before three different chancellors. The allowance made by the court for complainant's solicitors' fees seems to be reasonable. The finding of facts

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the American Friends Service Committee in the Soviet Union.

资料来源：根据《中国统计年鉴》、《中国农村统计年鉴》和《中国农村住户调查年鉴》有关数据整理。

THESE DOCUMENTS SONT LOUÉS PAR LA BIBLIOTHÈQUE NATIONALE

There is some question as to whether the above is a true statement.

Business not in the best interest of public health or safety

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1. 1990年12月15日，在北京市召开的中国工程院成立大会暨工程院第一次院士大会上的讲话。

1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

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1990-1991: The first year of the study. The sample was selected from the 1989-1990 census of the United States. The sample was selected from the 1989-1990 census of the United States. The sample was selected from the 1989-1990 census of the United States.

The authors would like to thank Dr. J. H. D. E. van der Grinten for his contribution to the design of the study.

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made by the master have been approved by the chancellor and cannot be disturbed upon appeal unless manifestly and clearly against the weight of the evidence. Schrader v. Schrader, 298 Ill. 469; Niegel v. Andrews, 181 id. 350. These findings of fact cover all items in controversy upon the accounting between the parties, including the credit taken by Rosenstone for services rendered, upon which appellants now base a claim for usury. There was a complete accounting between Clark and Rosenstone as to the transactions between them which must be regarded as conclusive in the absence of any claim of fraud or mistake in respect thereto. Bennett v. Baker, 100 Ill. 525; Miles v. Harmon, 80 id. 396.

The decree of the Circuit Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

63 - 27532

THE PEOPLE OF THE STATE
OF ILLINOIS, Defendant in Error,
vs.
HERMAN SPITZ, Plaintiff in Error.

226 I.A. 662

ERROR TO ORIGINAL COURT
OF COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The indictment in this case contained two counts, in the first of which defendant was charged with taking certain improper and indecent liberties with one Alice Luck, a child five years of age. The second count charged that on June 21, 1921, defendant did certain acts which tended to render said Alice Luck a delinquent child. The specific acts relied upon are not set forth in the indictment. On motion of the state's attorney the felony charged was waived, whereupon the trial by jury was waived by defendant, who pleaded not guilty to the second count. The court found the defendant guilty and sentenced him to six months imprisonment in the house of correction. It is urged as grounds for reversal that the finding of the court was contrary to the manifest weight of the evidence; that there was reasonable doubt as to defendant's guilt; that the court considered incompetent testimony; that there is no evidence in the record fixing the age of the prosecutrix and that the indictment was defective in that it did not set forth the specific acts of the defendant which tended to render the prosecutrix a delinquent child.

We have carefully examined the evidence in the case and find that the prosecutrix relied principally upon the testimony of William Frank Bowers, a boy six years of age. Before a child of this age is permitted to testify he should give satisfactory answers

to certain preliminary inquiries showing that he understood the nature and meaning of an oath, the consequences of giving false testimony and that he is of sufficient intelligence to understand the matters about which he is expected to testify. His competency depends upon his intelligence, understanding and moral sense.

People v. Johnson, 298 Ill. 82; Sokol v. Fomic, 312 Id. 238; People v. Marcovich, 243 Id. 263. The witness totally failed to comply with these tests. He did not answer several material questions propounded to him on preliminary examination. There is no evidence that he understood the obligation of an oath, or the difference between the truth and a falsehood or that he comprehended the significance of the matters upon which he was called to testify. While no attempt was made to qualify as a witness alicia Luer, the prosecutrix, who was five years of age, no objection was made to her testifying.

The judgment is reversed and the case remanded for receiving the testimony of the boy under such circumstances.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

The following is a list of the names of the persons who have been identified as having been in contact with the subject of this investigation, and who have been identified as having been in contact with the subject of this investigation, and who have been identified as having been in contact with the subject of this investigation.

87 - 27539

226 I.A. 662

IDA MADISON BUCK,
Defendant in Error,

vs.

GUSTAV NORTHAUS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE RONNELL DELIVERED THE OPINION OF THE COURT.

Judgment was entered by confession on October 15, 1921, by the Municipal Court of Chicago in favor of defendant in error and against plaintiff in error for \$645.75, the amount due upon a judgment note signed by plaintiff in error. Subsequently a motion was made on behalf of the judgment debtor, supported by his affidavit, to vacate the judgment. This motion was denied, from which order an appeal was allowed and the defendant was granted sixty days within which to file a bill of exceptions. This appeal was not perfected but a review of the proceedings is sought by the present writ of error. The record contains no bill of exceptions, but certain documents purporting to be a motion to vacate the judgment, an affidavit in support thereof and the ruling of the trial court upon the motion have been inserted in the common law record.

It has been held by numerous decisions of the reviewing courts of this state that motions, affidavits in support thereof and rulings thereon must be incorporated either in a bill of exceptions or stenographic report and signed by the judge of the trial court before they can become a part of the record. Otherwise the common law record cannot be enlarged. Recitals in the judgment order of the court and suggestions of counsel in their brief and argument that certain rulings were made on motions supported by affidavits are not sufficient to entitle parties to

200. A. I. 1022

a review of the proceedings. Seale v. Owen, 303 Ill. 308; Bellinger v. Barnes, 323 id. 181. A motion and an affidavit inserted in the record by the clerk cannot be considered. Anderson Transfer Co. v. Fuller, 78 Ill. App. 48. This rule has been announced so frequently and in such a long line of decisions that there is no necessity for a citation of cases in its support. Fairbridge v. Margenheimer, 137 Ill. 400.

There being no error in the common law record, the order of the Municipal Court overruling the motion to vacate the judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

ELIZABETH KELLEY,
Appellee,

vs.

FRANK A. NOVAK, Doing Business
as Novak & Co.,
Appellant.

226 I.A. 662

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago for \$400 in favor of appellee, who was plaintiff in that court. The case was tried by the court without a jury. Appellant, who was defendant in the Municipal Court, seeks a reversal upon the ground that the judgment is contrary to the law and the evidence.

The amended statement of claim charged that defendant, who was a real estate broker, procured a purchaser for plaintiff of the property known as number 226 West 104th Street, Chicago; that the consideration for the sale was \$2100, payable as follows: \$600 in cash, \$500 in monthly instalments and \$1,000 by mortgage on the premises; that in the course of the transaction defendant negotiated for plaintiff a mortgage of \$1,000 on the premises and obtained the cash therefor, making a total amount of \$1600 received by defendant as plaintiff's agent on the sale of the property, from which he was entitled to deduct a commission of \$100, leaving a balance due plaintiff of \$1500, and that of this amount defendant had paid \$1100, leaving a balance due plaintiff of \$400, for the recovery of which this action was brought.

Defendant's affidavit of merits substantially admits the transaction as charged by plaintiff, although denying the alleged indebtedness for the balance of \$400 as alleged herein.

SECTIONS

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SECTION 23

SECTION 24

It alleged that plaintiff and her husband at the time she authorized the sale of said property also listed with defendant a certain other piece of real estate, known as number 10508 Lafayette Avenue, Chicago, to be sold for \$6,000 net to them if sold on or before May 1, 1930; that the authorized terms of payment for said last mentioned real estate were at least \$1500 in cash, the assumption of a mortgage on the premises for \$2,000 and the balance in monthly payments; that in conformity with this authorization, defendant on April 29, 1930, sold the premises for \$6400, out of which amount defendant was entitled to retain \$400 for his services, being the amount in excess of the price for which plaintiff and her husband had agreed to sell; that the proposed purchaser had paid \$2000 in earnest money and signed a contract of purchase, agreeing to pay \$4200 more upon approval of the title and delivery of the deed and to assume the existing mortgage of \$2,000, but that plaintiff and her husband refused to execute the contract or to consummate the proposed sale. The affidavit further alleged that on July 17, 1930, there was an accounting and settlement between the parties, whereby defendant paid to plaintiff the sum of \$1094 in full satisfaction of all money collected by him on the sale of the property on West 104th Place and the proceeds of the mortgage of \$1,000 thereon after taking credit for a commission of \$400 due to him on the sale of the Lafayette Avenue property. It appears that the difference between \$1094 and \$1100, the receipt of which is admitted by plaintiff, resulted from an adjustment of expenses for continuation of the abstract and insurance on the premises. The evidence shows that this amount was not received by plaintiff in full settlement of the claim, but that it was paid by defendant and received by plaintiff with the understanding that the rights of the parties with reference to the balance of \$400 should be determined by a suit to be brought by plaintiff for that purpose. Therefore the only question presented

to us for determination is whether or not defendant was entitled to retain said sum of \$400 for his commission on the sale of the Lafayette Avenue property.

The evidence further shows that this property was owned by plaintiff and her husband as joint tenants. Plaintiff's husband, who had listed it for sale with defendant, testified that some days prior to the time when defendant presented the proposed contract for the sale thereof, he notified defendant that the property was withdrawn from the market and that his wife, plaintiff herein, was unwilling to sell. Plaintiff herself testified that she never authorized her husband to list the property for sale and had never authorized defendant to sell the same. This testimony is contradicted by defendant, who testified that both Mr. and Mrs. Kelley had authorized him in sundry conversations to sell the property. No written authority to sell was claimed or proven.

The indebtedness of \$400 from defendant to plaintiff on the sale of the 104th Place property ^{being} admitted, and the employment of defendant to sell the Lafayette Avenue property being disputed and the evidence conflicting in respect thereto, we are unable to say that the finding and judgment of the trial court was contrary to the manifest weight of the evidence.

The claim of defendant for a commission on the sale of the Lafayette Avenue property was against plaintiff and her husband, who were the joint owners thereof. For this reason it was not a proper subject of set-off against the claim of plaintiff herein for the sum of \$400 due to her individually on the sale of the 104th Place property. In order to be the subject of set-off, debts must be mutual to the parties to the action. "A joint indebtedness cannot be set off against a separate demand, nor can a separate demand be set off against a joint indebtedness." This is a familiar rule. Dameier v. Bayor, 167 Ill. 547.

The judgment of the Municipal Court was not contrary to the law or against the manifest weight of the evidence. It is therefore affirmed.

affirmed.

Barnes, F. J., and Gridley, J., concur.

the members of the new board of directors will be appointed, and

it is recommended that the board of directors be authorized to make all
such decisions as may be necessary.

RESOLVED,

That the board of directors be authorized to make all such decisions as may be necessary.

147 - 37623

226 I.A. 663

EDWARD BERTHA,
Appellee,

vs.

RASHLEIGH BUCK,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MONROE DELIVERED THE OPINION OF THE COURT.

Judgment by confession was entered in the Municipal Court of Chicago July 18, 1921, in favor of appellee and against appellant for \$100, which included the sum of \$75 alleged to be due as rent for ^acertain derided apartment for the month of July, 1921, with \$25 for attorney's fees, as provided in the lease. The judgment was subsequently vacated and a trial was had before the court without a jury, resulting in a finding and judgment in favor of appellee, from which this appeal has been taken.

At the conclusion of the trial the court made certain findings of fact, which are substantially as follows: The court found that defendant, who is appellant here, had been in possession of the premises then occupied by him for over seven consecutive years under leases identical with the lease involved herein, except as to dates and amount of rent; that in none of them was the word "awning" used; that during all of this time and at the time of the execution of the lease involved herein, awnings were kept installed outside of the windows of the apartment occupied by defendant at the sole expense of the landlord; that the landlord during all the seven years previous to May, 1921, replaced and repaired the said awnings from time to time as they might become worn out, torn or destroyed from various causes; that about May in each year the landlord would place awnings outside the windows of the apartment in question, and in the fall of the year he took them down and stored them at the landlord's

805 1022

expense; that there are bolts and braces in the walls outside of and around the edges of the windows of the apartment rented by defendant which are used for attaching the awnings thereto; that the awnings were in service on said building at the time defendant commenced his occupancy seven years ago; that subsequent to the signing of the lease involved herein, the landlord conveyed all his right, title and interest in and to the premises, where the apartment occupied by defendant was located, to the plaintiff in this cause and assigned the lease to plaintiff; that early in the summer of 1921 the plaintiff (appellee), who had become the landlord of defendant, refused to continue to furnish awning service as has been done during previous years, and notified defendant thereof; that thereupon defendant expended the sum of \$23 in order to repair and hang the awnings which plaintiff refused to repair and hang, which amount was stipulated to be a reasonable charge therefor; that thereafter defendant tendered to plaintiff the sum of \$58 as rent for the month of July, 1921, which sum was the difference between the monthly rental stipulated by the lease and the amount defendant had spent for awnings aforesaid, which tender was refused, and that the sum of \$25 was stipulated as being reasonable fees for plaintiff's attorneys in the matter. This finding of facts is a sufficient statement of all matters urged in defense of the claim, with the possible exception of the fact that the windows upon which the awnings were used were on the west side of the building, and that without such awnings it was difficult to exclude the sun from the apartment, rendering the rooms hot and uncomfortable during the summer months.

The court held as a matter of law that the findings of fact above mentioned did not constitute a defense to the action for rent for the month of July, 1921, by the plaintiff upon the lease. We think that the ruling of the court was correct. An

executory contract under seal, when its terms are clear and unambiguous cannot be varied, contradicted or modified by parol evidence. Alschuler v. Schiff, 164 Ill. 398; Schneider v. Salser, 212 id. 87; McKinney v. Mulvey Mfg. Co., 157 Ill. App. 358. Parties to a lease cannot testify as to their understanding and intention to aid in the construction of a lease. The trial court properly excluded evidence of this character.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

SAMUEL KORNLAND,

Appellee.

vs.

WILLIAM PRENDERGAST,
THOMAS J. PRENDERGAST and
THOMAS MULROY,

Appellants.

226 I.A. 663
APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is a personal injury case in which there was a verdict and judgment in favor of plaintiff, who is appellee here, for \$5055.54, the amount of damages sustained by him as the result of a collision between a horse-drawn vehicle in which plaintiff was riding and an automobile alleged to have been owned, operated and controlled by defendants. Appellants, who were defendants below, urge as grounds for a reversal that the verdict and judgment are contrary to the manifest weight of the evidence; that the trial court erred in overruling the motion of two of the defendants for leave to file a special plea denying ownership, possession and control of the automobile in question; that even in the absence of such special plea the burden was upon the plaintiff of proving that the automobile was owned, operated and controlled by defendants and that the answers to certain hypothetical questions propounded to two of plaintiff's witnesses were erroneously received in evidence. It is also urged by appellants that the trial court erred in giving and refusing to give certain instructions to the jury.

The evidence shows that the accident took place November 3, 1918, at the intersection of Wabash Avenue and Forty-sixth Street in Chicago, Illinois, between eleven and twelve o'clock in the forenoon. Forty-sixth Street runs east

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and west; Wabash avenue runs north and south. At the intersection, Forty-sixth street is about forty to fifty feet wide and Wabash avenue from sixty to seventy feet in width. Both streets were paved with asphalt and were dry on the day of the accident. The neighborhood in which the accident occurred is residential. Prior to the accident plaintiff was driving a horse and wagon in a westerly direction on Forty-sixth street between Wabash and Indiana avenues, the latter being two blocks east of Wabash avenue. He was on the north or right hand side of the street at and prior to the accident and was moving at the rate of four or five miles an hour. His testimony as to the rate of speed at which he was travelling is corroborated by other witnesses. At this time defendants were proceeding northerly on Wabash avenue in an automobile and approached the street intersection at a rate of speed which is estimated by plaintiff's witnesses to be in excess of twenty miles an hour. It is undisputed that plaintiff had reached the east line of Wabash avenue before defendants had reached the south line of Forty-sixth street. The collision took place when plaintiff's wagon had crossed almost three-quarters of Wabash avenue. As a result of the collision plaintiff was thrown to the pavement, striking the asphalt with his head, causing a fracture of the skull. His injuries were serious and resulted in his confinement and inability to labor for a period of several weeks. The testimony indicates that some of the injurious results of the accident are permanent. No claim is made on behalf of appellants that the damages are excessive. Although the testimony was conflicting in some respects, particularly as to the respective rates of speed of the two vehicles, it is apparent that there was sufficient evidence to sustain the verdict of the jury. It was not contrary to the manifest weight of the evidence.

and went; which means from north and south. At the intersection, forty-nine feet is about forty to fifty feet wide and about twenty feet high. The accident occurred in the neighborhood in which the accident occurred is a residential. Prior to the accident plaintiff was driving a car and wagon in a westerly direction on forty-ninth street between Fourth and Indian avenues, the latter being two blocks east of Fourth avenue. He was on the north or right hand side of the street at and when in the accident and was moving at the rate of four or five miles an hour. His testimony as to the rate of speed at which he was travelling is corroborated by other witnesses. At this time defendant was travelling westward on Fourth avenue in an automobile and approached the street intersection at a rate of speed which is estimated by plaintiff's witnesses to be in excess of twenty miles an hour. It is undisputed that plaintiff had crossed the east line of Fourth avenue before defendant had reached the south line of forty-ninth street. The collision took place when plaintiff's wagon had crossed about three-quarters of Fourth avenue. As a result of the collision plaintiff was thrown to the pavement, striking his head with his head, causing a fracture of the skull. His injuries were serious and resulted in his confinement and inability to work for a period of several weeks. The testimony indicates that none of the injuries resulted of the accident are permanent. No claim is made on behalf of plaintiff that the damages are excessive. Although the testimony was conflicting in some respects, particularly as to the respective rates of speed of the two vehicles, it is apparent that there was sufficient evidence to sustain the verdict of the jury. It was not contrary to the weight of the evidence.

The case was commenced September 13, 1915. The declaration was filed October 8, 1915, charging defendants with negligence in the operation of the automobile, resulting in the accident and injury to plaintiff as above stated. A plea of the general issue was filed November 25, 1915. Thereafter sundry motions were made by plaintiff to advance the case, which were denied. On October 8, 1921, a motion was made on behalf of two of the defendants for leave to file an additional plea alleging non-ownership of the automobile, which was overruled. On November 3, 1921, the case was called for trial, issues were joined and an adjournment taken until the following day, on which the trial took place. Before commencing the trial counsel for defendants renewed their motion for leave to file a special plea on behalf of two of the defendants alleging non-ownership, possession and control of the automobile, which was again overruled. Appellants claim that in so doing the trial court was guilty of an abuse of discretion, relying upon the case of Clark v. Wisconsin Central R. R. Co., 261 Ill. 407, in which it was held that the denial of a motion for leave to file a special plea of non-ownership, control and management was reversible error. In that case the failure to file the plea was the result of a misconception of the legal rights of the parties under pleas on file, and ~~XXXX~~ granting the motion would not have involved any question of the statute of limitations, while in the case at bar that statute had run against plaintiff's claim at the time the offer to file the special plea was made, and if the motion had been allowed, nearly nine years after the occurrence of the accident, during which plaintiff was justified in believing he had sued the right defendants and that proof of ownership, operation and control was not necessary, it would have been impossible for plaintiff to bring in other defendants.

If plaintiff had been afforded timely notice by a special plea that the want of ownership was relied upon as a defense, he would have had an opportunity of making investigation, and upon ascertaining that he had sued the wrong party he might, before the statute of limitations became a defense, bring his suit against the party that was in fact liable. Chicago Union Traction Co. v. Jerken, 227 Ill. 95; Procter v. Wells Bros. Co., 181 Ill. App. 468. The application for leave to file the additional plea was addressed to the discretion of the court and a defendant who presents such an application should support the motion by showing some reasonable excuse for not having presented the defense before the calling of the cause for trial. Otherwise the application is not entitled to favorable consideration. City of Chicago v. Cook, 204 Ill. 373; Page v. Hallam & Co., 212 Ill. App. 462. No effort of any sort was made to excuse the delay. There is no abuse of discretion in excluding a plea where it appears that a long period of time has elapsed between the date of the bringing of the suit and the offer of the plea, and where the offer of the plea is not accompanied by any statement explaining or excusing that delay.

Appellants also contend that even in the absence of a plea denying ownership and operation of the automobile, it was incumbent upon plaintiff to prove that the defendants were the owners or had control of the management and operation of the automobile, relying upon the case of Faters v. Howard, 206 Ill. App. 610, in which it is said that the rule whereby a corporation must deny by special plea that it was neither the owner nor operator of the instrumentality by which the plaintiff was injured, in order to require proof of such allegations by plaintiff, does not apply to a person who is charged with committing a negligent act. This distinction between an individual and a corporate defendant is not sustained by any citation of authority. On the

It definitely had been afforded timely notice by a special agent
that the fact of ownership was relied upon as a defense, he
could have had an opportunity of making investigation, and upon
ascertaining that he had owed the wrong party his debt, before
the statute of limitations became a defense, being his only
against the party that was in fact liable. Chicago Union Station
100 Ill. 408. The application for leave to file the additional plea
was addressed to the discretion of the court and a reference was
made to the fact that the application was made by counsel
some reasonable excuse for not having presented the defense before
the calling of the cause for trial. Otherwise the application in
not entitled to favorable consideration. 100 Ill. 408.
100 Ill. 408. 100 Ill. 408. 100 Ill. 408. 100 Ill. 408.
at any time was made to excuse the delay. There is no issue of
discretion in granting a plea where it appears that a long period
of time has elapsed between the date of the bringing of the plea
and the date of the trial, and where the plea is not
accompanied by any statement explaining or excusing the delay.
Appellate also cannot find even in the absence of a
plea denying ownership and operation of the automobile, it was
immaterial to prove that the defendants were the
owners or had control of the management and operation of the
automobile, relying upon the case of 100 Ill. 408.
100 Ill. 408. 100 Ill. 408. 100 Ill. 408. 100 Ill. 408.
must deny by special plea that it was neither the owner nor
operator of the instrumentality by which the plaintiff was injured,
in order to require proof of such allegations by plaintiff, does
not apply to a person who is charged with committing a negligent
act. This distinction between an indictment and a complaint
is not sustained by any citation of authority. On the

contrary, it has been held that a special plea of this character is necessary in order to prove the allegation that individual defendants were in the possession and control of the instrumentality causing the accident and that these facts stand admitted in the absence of such a plea. This question was fully considered in the case of Halscomb v. Hagen, 217 Ill. App. 372, and the authorities reviewed, from which it appears that in a number of cases where the defendants were individuals and not corporations, the reviewing courts of this state have followed the rule that in the absence of a special plea alleging non-ownership, non-operation and non-control, the allegations of a declaration charging the operation and control of an instrumentality stand admitted. Carlson v. Johnson, 263 Ill. 586; Thomas v. Anthony, 261 id. 286; Brown v. Richardson, 177 id. 488.

Complaint is made that the court erroneously instructed the jury to the effect that under the pleadings filed by the defendants in the case they admitted that they were in possession and control of the automobile in question at the time and place of the accident. In the absence of any special plea denying ownership, operation and control, this instruction was correct. It is also urged that a certain other instruction to the effect that if the evidence bearing upon plaintiff's case as alleged in his declaration preponderates but slightly in favor of plaintiff, it will be sufficient for the jury to find the issues in his favor. Instructions of this character have been repeatedly approved. We think that the instructions taken as a series fairly stated the law applicable to the case.

The hypothetical questions propounded to the medical witnesses called as experts on behalf of plaintiff were proper in form and are in conformity with the rules established by our Supreme Court in a number of cases which it is unnecessary to

country. It has been said that a general idea of this character
is necessary in order to make the allegations that individuals
defendants were in the possession and control of the instruments
damaging the accident and that these facts are consistent in the
absence of such a plan. This question was fully considered in the
case of Holmes v. Morgan, 217 Ill. 2d, 197, and the defendant
reviewed, from which it appears that in a number of cases where
the defendants were individuals and not corporations, the review
of this case have followed the rule that in the absence
of a special plan, the defendant, individually, is not
control, the allegations of a declaration charging the operation
and control of an instrumentality are sufficient. United v.
United, 225 Ill. 2d, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

cite.

We are of the opinion that the trial court committed no error in its rulings upon questions of evidence or in giving or refusing instructions, and as the judgment was not contrary to the manifest weight of the evidence, it cannot be disturbed.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

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